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34 **705.1.1 Indian Child Welfare Act (ICWA) Description**

35
36 Philosophy

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

43
44 Purpose Of The ICWA

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

51
52 The best interests of Native American children are inherently tied to the concept of belonging,
53 which is key to the theme of temporary and permanency planning. Belonging can only be
54 realized for Native American children by recognition and enhancement of the support networks
55 that exist in the child’s extended family, clan, or Tribal systems. Permanency develops from
56 identification with these systems through a sense of connectedness.

57
58 It is the principles of Child and Family Services to support these purposes through full
59 compliance with and conscious adherence to the requirements of ICWA.

60

61 **705.2 Determining When ICWA And Related Agreements Apply**

62 Major objectives:
63 Child and Family Services will make agreements with Native American Tribes to implement child
64 welfare programs.
65

66

67 **Applicable Law**

68 25 U.S.C. §1919
69 States and Native American Tribes are authorized to enter into agreements with each other
70 respecting care and custody of Native American children and jurisdiction over child custody
71 proceedings

72

73 Practice Guidelines

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

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

Major objectives:

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

Applicable Law

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

Practice Guidelines

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

-
- 145
- 146 D. Upon receiving protective custody of an AI/AN child residing outside the boundaries of
- 147 the reservation, the Child and Family Services caseworker will:
- 148 1. Contact and staff the case with the state ICWA specialist.
- 149 2. Inform the Assistant Attorney General that there is reason to believe that the
- 150 child is a Native American child and subject to the requirements of the ICWA
- 151 prior to initiating a petition. This will ensure that proper federal requirements of
- 152 the ICWA and associated procedures are followed.
- 153 3. Advise the Tribal/Nation's ICWA representative through notice of taking
- 154 protective custody of the AI/AN child.
- 155 a. A Child and Family Services caseworker should establish Tribal contact as
- 156 early as possible in an ICWA case.
- 157 b. Child and Family Services caseworkers must work in partnership with
- 158 Tribal social workers throughout the course of a child custody proceeding
- 159 involving a Native American child. Having the Tribe's social worker and
- 160 Tribal attorney on board at the beginning of the case sets the stage for
- 161 assistance, advice, positive conjoint efforts, Tribal intervention, possible
- 162 transfer of the case, the sharing of critical, culturally relevant resources
- 163 and information, and maximum input on placement decisions.
- 164 c. Child and Family Services caseworkers should continually maintain
- 165 contact with Tribal social workers.
- 166
- 167 E. Child and Family Services will gather the following information, if available, from the
- 168 child or parent or Native American custodian and any other person with knowledge of
- 169 the child or parent's Tribal affiliation. The information will assist in the confirmation or
- 170 determination of Tribal membership:
- 171 1. The name of the Tribe or Tribes that the child and parent are a member of or
- 172 eligible for membership in.
- 173 2. The Tribal enrollment certification, identification numbers, or other documents
- 174 that show the child and/or parent(s) are a member or eligible for membership in
- 175 a Tribe.
- 176 3. The birth mother's maiden name, and names of the maternal and paternal
- 177 grandparents and biological and/or legal father(s).
- 178 4. Birth dates and birthplaces of the child and parent(s).
- 179 5. Social Security Numbers of the child and parent(s).
- 180 6. Degree of Indian Blood and/or Certificate of Indian Blood (CIB) of child and
- 181 parent(s).
- 182 7. If either birth parent was adopted, obtain the name of his or her birth parents (if
- 183 available).

-
- 184 8. Other information about extended family members including dates of birth and
185 addresses of grandparents, aunts, uncles, cousins, great grandparents,
186 stepparents, and first and second cousins.
187
- 188 F. When the child's Tribe has been identified and the above information gathered and
189 documented in SAFE, the Child and Family Services caseworker will contact (by letter or
190 phone) the Tribe's membership/enrollment office to ask them to make a determination
191 whether the child is a member or eligible for membership in the Tribe. If the child is
192 connected to more than one Tribe, all of the relevant Tribes must be contacted.
- 193 1. "Member" is defined by some Tribes as a descendent and does not equal
194 enrollment.
195 2. Formal notice to the Tribe regarding the court process is still required.
196 3. The Tribal worker will work with the Child and Family Services caseworker once
197 the Tribe is notified and throughout the case process.
198
- 199 G. If the Tribe does not respond, call the Tribal enrollment officer or other Tribal
200 employees or officials responsible for, or knowledgeable about, Tribal membership.
201 1. Several follow-up calls may be necessary as many of the Tribes are understaffed.
202 2. Follow the call with a certified letter documenting the conversation.
203
- 204 H. If the Tribe responds that the child is not an enrolled member, but is eligible for
205 membership and the biological child of a member of a Native American Tribe, the Child
206 and Family Services caseworker will:
- 207 1. Request (or assist the family in completing) Tribal membership application forms
208 for the child.
209 2. Encourage the child's parents or Native American custodian to enroll the child in
210 the Tribe to facilitate cultural ties and establish eligibility for potential Tribal
211 benefits.
212
- 213 I. Once a Tribe has determined that a child is not a member and not eligible for
214 membership enrollment, ICWA does not apply. The Child and Family Services
215 caseworker will:
- 216 1. Document all steps taken to determine the child's Native American or Tribal
217 ancestry.
218 2. File the Tribe's written statement declaring that the child is neither a member of
219 the Tribe nor eligible for membership (and the biological child of a member of a
220 Native American Tribe).
221 3. Incorporate in any court hearing the Tribe's written statement declaring that the
222 child is neither a member of the Tribe nor eligible for membership (and the
223 biological child of a member of a Native American Tribe).
224

- 225 J. If the Tribe determines the child is a member or is eligible for membership and the
226 biological child of a member of a federally recognized Tribe, ICWA APPLIES.
227 1. Some Tribes define descendants as “members” for ICWA services. Child and
228 Family Services caseworkers must follow ICWA whenever a Native American
229 child is determined to be a “member” of a Tribe.
230 2. If the child was determined to be covered by ICWA (or if eligibility is not yet
231 determined) and there are past or pending custody proceedings, the case must
232 be treated as an ICWA case and is subject to ICWA procedures until the child is
233 determined to be non-Native American.
234
235 K. The Child and Family Services caseworker should document in SAFE:
236 1. All inquiries (oral or written) regarding the child’s ethnicity.
237
238 L. When the child was initially determined to be Native American, the Child and Family
239 Services caseworker should also document::
240 1. Family history chart.
241 2. Tribal enrollment number.
242 3. Tribal ID card.
243 4. Certificate of Degree of Indian Blood (CIB).
244 5. Other evidence such as a letter from the Tribe, Bureau of Indian Affairs.
245 6. Documentation from the Indian Health Service, medical clinic or school, etc.
246

247 **705.4 Emergency Removal Of A Native American Child**

248 Major objectives:

249 When there is an emergency removal, the Child and Family Services caseworker will
250 immediately cause an inquiry to be made as to the residence and domicile of the child.
251

252 **Applicable Law**

253 25 U.S.C. §1915

254 If the child is believed to be Native American, the Child and Family Services caseworker must
255 undertake diligent efforts to place the child during emergency care in a setting that complies
256 with the placement preference set forth in §1915(b) or (c) of the ICWA (including cases
257 involving emergency placements).
258

259 Practice Guidelines

- 260 A. After making a removal, the following conditions must be immediately considered
261 unless circumstances do not permit such inquiry, and the Native American status of the
262 child must be immediately determined:
263

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

- 304 H. If the name and location of the child's parents, Native American custodian (if any), or
305 Tribe is unknown, the Child and Family Services caseworker should document the
306 diligent efforts undertaken to obtain this information.
307
- 308 I. If the name and location of the parent, Native American custodian, or Tribe is known,
309 the Child and Family Services caseworker must obtain from the Tribe whether the
310 residence or domicile of the parent, Native American custodian, or child is on or near a
311 reservation, and identify the reservation.
312
- 313 J. Develop a specific and detailed account of the circumstances that led to the conclusion
314 that the child would suffer imminent physical damage or harm. These facts should be
315 well documented.
316
- 317 K. Set forth a specific plan of action describing the "active" reunification efforts that have
318 been undertaken and which are planned to restore the child to his or her parents or
319 Native American custodian.
320
- 321 L. Develop a specific plan of action to physically transfer the child to the jurisdiction of the
322 appropriate Native American Tribe pursuant to 25 U.S.C. §1911(b), in cooperation with
323 the Tribal social worker.
324

705.5 Notice

Major objectives:

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

Applicable Law

25 U.S.C. §1912(a)

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

Practice Guidelines

- A. No foster care placement or termination of parental rights proceeding may be held until the Tribe(s), parents, and Native American custodian have received proper notification and ICWA timelines have been followed.

-
- 343 B. There are specific timelines set forth in §1912(a) of ICWA. This provision states that a
344 custody proceeding cannot go forward until:
- 345 1. At least 10 days after receipt of notice by the parents or Native American
346 custodian, or after 30 days if 20 additional days are requested by the parents or
347 custodian to prepare for the proceedings.
 - 348 2. At least 10 days after receipt of notice by the Tribe, or after 30 days if the Tribe
349 requests an additional 20 days to prepare for the proceeding.
 - 350 3. At least 15 days after receipt of notice by the Secretary of the Interior (Bureau of
351 Indian Affairs) if the identity or location of the parent or Native American
352 custodian and the Tribe cannot be determined.
- 353
- 354 C. Those to receive the ICWA notice of each proceeding are:
- 355 1. Parents.
 - 356 2. Native American custodian, if any.
 - 357 3. Tribe.
 - 358 4. Additional Tribes (if the child is affiliated with or eligible for membership in more
359 than one Tribe, all Tribes should receive notice).
 - 360 5. Bureau of Indian Affairs in Washington, D.C. as well as the appropriate Bureau of
361 Indian Affairs area office if identified/location of parents or custodians cannot be
362 determined.
- 363
- 364 D. Notice is served by the following:
- 365 1. Notice may be provided by registered mail, returned receipt requested.
 - 366 2. Notice must be filed with the court, along with any returned receipts or other
367 proof of service.
 - 368 3. The case files must be properly documented regarding proof of service.
 - 369 4. Even if the Tribe does not respond, an official notice is sent of every future
370 proceeding.
 - 371 5. Even if a Tribe replies that it does not wish to intervene in the proceeding,
372 notices of every future proceeding are sent.
 - 373 6. Determination must be made that the parent was proficient in the English
374 language.
 - 375 7. If there is a reason to believe that the parent or Native American custodian will
376 not understand the notice because of possible limited English proficiency, a copy
377 of the notice must be sent to the Bureau of Indian Affairs Area Office nearest to
378 the residence of that person, and a request must be made to the Bureau of
379 Indian Affairs staff to arrange to have the notice explained to that person in the
380 language that he or she best understands. The written request must be properly
381 documented in the case file.

- 382 8. If a person is assigned to explain the notice to the parent or Native American
383 custodian in the language that is best understood, the details of the assistance
384 rendered must be documented in the case file.
385

386 **705.6 American Indian/Alaska Native Parent Or Indian Custodian Rights** 387 **To Legal Counsel**

388 Major objectives:

389 The Child and Family Services caseworker will, at the earliest point in the case, advise the
390 parents or Native American custodian of their right to court-appointed legal counsel.
391

392 **Applicable Law**

393 25 U.S.C. §1912(b)

394 Pursuant to §1912(b) of ICWA, the court is mandated to appoint legal counsel for an indigent
395 parent or Native American custodian in any removal, placement, or termination proceeding
396

397 Practice Guidelines

- 398
- 399 A. Inform the AI/AN parents or Native American custodian of the procedures that must be
400 followed to have legal counsel appointed.
401
- 402 B. The right to counsel applies in proceedings initiated by the state and those initiated by
403 private parties, such as stepparent adoption proceedings and intrafamily disputes.
404
- 405 C. The right to counsel also extends to pre-adoptive and adoptive placement preferences.
406

407 **705.7 Jurisdiction**

408 Major objectives:

- 409 A. In every case involving a Native American child, the Child and Family Services caseworker
410 must routinely ask the child's Tribe whether the child is a ward of the Tribal court under
411 any prior Tribal court proceedings.
412
- 413 B. Once it is determined that a case is a child custody proceeding under ICWA and that the
414 child is Native American, it must then be determined which court has jurisdiction.
415

416 **Applicable Law**

417 25 U.S.C. §1911(a) and (d)

- 418
- 419 A. Exclusive jurisdiction is vested with the Tribal court over any child custody proceeding
420 involving a Native American child who:
421

- 422 1. Resides or is domiciled within the reservation or is a ward of the Tribal court,
423 regardless of the child's domicile.
424 2. If an order establishing Tribal court wardship is currently in force, the state court
425 must accord full faith and credit to any Tribal court orders, records, and judicial
426 proceedings.
427

428 Practice Guidelines

- 429 A. Concurrent jurisdiction lies with the Tribal and state court when a child resides or is
430 domiciled off the reservation and the child is not a ward of the Tribal court.
431
432 B. A foster care placement or termination of parental rights proceeding may be transferred
433 to Tribal court under §1911(b) of ICWA absent:
434 1. The Tribal court's declination of the case.
435 2. "Good cause" to the contrary.
436 3. Objection by a parent.
437
438 C. Some Tribes might decline jurisdiction due to limited resources (e.g., no Tribal court, or
439 limited medical or mental health services). If a Tribe declines jurisdiction, Child and
440 Family Services will still give notice to the Tribe.
441
442 D. In every case involving an AI/AN child, the Child and Family Services caseworker will:
443 1. Work closely with the Assistant Attorney General and Tribal Attorney to clarify
444 initial jurisdiction.
445 2. Ask the Tribal social worker early in the case whether the Tribe would like the
446 jurisdiction to be transferred to their Tribal court.
447 3. Work closely with the Tribal social worker, if the Tribe accepts transfer of the
448 case, to coordinate appropriate legal documents required by the state court to
449 effectuate the transfer and to make arrangements for the physical transfer and
450 delivery of the child.
451 4. Continue to involve the Tribal social worker, even when a Tribe declines transfer
452 of a case. The Tribal social worker can play a significant role in the concurrent
453 planning process for the long-term well-being of the child.
454

455 **705.7.1 Transfer Of Jurisdiction To An Indian Tribe With A Title IV-E**
456 **Agreement**

457 Major objectives:

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

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Practice Guidelines

- A. In order to provide for the continuation of coverage, the Child and Family Services caseworker will work with the eligibility worker and the health care nurse to provide a packet with the following information to the Tribe:
1. The court order from the shelter hearing showing that continuation in the home from which the child was removed would be contrary to the welfare of the child or that reasonable efforts to prevent the removal of the child have been made.
 2. All documents related to the child's Title IV-E eligibility under sections 472 and 473 of the Social Security Act:
 - a. Relevant court orders.
 - b. Title IV-E/Medicaid application.
 - c. Determination forms.
 - d. Support documentation.
 - e. Birth certificate or other verification of citizenship.
 - f. Review documents.
 - g. Placement licensing information.
 - h. Federal benefits (SSA/SSI) information.
 3. All documents that the state has that relates to the child's IV-E eligibility or potential eligibility for other federal benefits such as death benefits, WIC, Headstart and others.
 4. A copy of the current Child and Family Services Plan developed with the Child and Family Team, a list of the members of the Child and Family Team with contact information, and minutes from the Child and Family Team Meeting used to develop that plan.
 5. The Health Report from SAFE that includes all health care information about the child recorded by Child and Family Services.
 6. Any educational records of the child, including school enrollment information.
 7. Information on all placements that the child has had in the current out-of-home care episode including the most recent provider's contact information and a copy of their foster care license including the expiration date of the license.
- B. Once the packet is complete, the caseworker will contact the Tribal worker at the Tribe and notify him or her that the packet will be sent and confirm address information for the Tribal worker. The packet will then be sent to the Tribal worker.

499 **705.8 Tribes' Right To Intervene**

500 Major objectives:

501 If the Tribe declines jurisdiction, the Tribe still will have the right to participate as an interested
502 party or to intervene at any point in the proceeding.
503

504
505 **Applicable Law**

506 25 U.S.C. §1911(c)

507 ICWA grants the Tribe the authority to intervene in any state court foster care placement or
508 termination of parental rights proceeding "at any point in the proceedings."
509

510 Practice Guidelines

511 A. The Tribes should be encouraged to intervene early in the child custody proceeding.
512

513 B. The right to intervene extends to voluntary as well as involuntary proceedings.
514

515 C. If the Tribe intervenes, it is a party to the proceeding and has the same rights to notice
516 of all hearings and assert its interest, the right of access to court records, the right to
517 retain counsel if it chooses, the right to appeal, the right to present witnesses, to cross-
518 examine witnesses, and to present other relevant evidence at the hearing.
519

520 D. Tribal recommendations should be documented in the case file and court reports.
521

522 **705.9 Transfer To Tribal Court**

523 Major objectives:

524 Child and Family Services will advise parents or Native American custodian that ICWA allows the
525 parent or Native American custodian or Native American Tribe to transfer the proceeding to
526 Tribal court.
527

528
529 **Applicable Law**

530 25 U.S.C. §1911(a) and (d)

531 A. Exclusive jurisdiction is vested with the Tribal court over any child custody proceeding
532 involving a Native American child who:

533 1. Resides or is domiciled within the reservation or is a ward of the Tribal court,
534 regardless of the child's domicile.

535 2. If an order establishing Tribal court wardship is currently in force, the state court
536 must accord full faith and credit to any Tribal court orders, records, and judicial
537 proceedings.
538

539 Practice Guidelines

- 540 A. The state court must transfer, unless the Tribal court declines jurisdiction, either parent
541 objects to such transfer, or if the court determines that good cause exists to deny the
542 transfer.
543
- 544 B. If the parent or Native American custodian requests, either orally or in writing, workers
545 should recommend such a transfer. If not, the grounds on which the worker would
546 oppose a transfer petition must be documented.
547
- 548 C. If the Tribe requests, either orally or in writing, workers should recommend such a
549 transfer. If not, the grounds on which the worker would oppose a transfer petition must
550 be documented.
551
- 552 D. If any party believes that good cause exists not to transfer the proceeding, they must
553 document in writing their reasons for such belief in the case record and court file.
554
- 555 E. Written statements must be distributed to all parties so that everybody has the
556 opportunity to provide the court with their views.
557

558 **705.10 Active Efforts Required To Prevent Family Breakup**

559 Major objectives:

- 560 A. Child and Family Services will undertake active efforts to provide remedial services to the
561 Native American family subsequent to an investigation and before a decision is made to
562 place the child out of the home.
563
- 564 B. The rehabilitative effort should take into account the prevailing social and cultural
565 conditions and the way of life of the child's Tribe. These requirements are meant to
566 assure that both evaluation of the problem and development of the treatment plan are
567 culturally appropriate and not tainted by cultural bias.
568

569 **Applicable Law**

570 Utah Code Ann. [§62A-4a-105](#). Division responsibilities.
571

572 Practice Guidelines

- 573 A. The Child and Family Services caseworker will offer the provisions of services of a
574 remedial nature designed to rehabilitate and prevent the breakup of Native American
575 families to the same extent that are available to non-Native American families when
576 eligible.
577

-
- 578 B. Prior to initiating a petition before a state court for foster care placement or termination
579 of parental rights, the Child and Family Services caseworker will undertake active efforts
580 to provide remedial services and rehabilitative programs to the family designed to
581 prevent its breakup.
582
- 583 C. In determining the type of remedial services that are appropriate, consider the
584 following:
- 585 1. Are the Native American child's or Native American parent's cultural values,
586 beliefs, and religious practices tied to the child's Tribe?
 - 587 2. Does the Native American child or parent or Native American custodian maintain
588 cultural ties to a Tribe?
 - 589 3. Is the Native American child or parent or Native American custodian willing to
590 accept services provided by the Tribe or an organization such as an AI/AN
591 cultural and/or service center?
 - 592 4. Is there an organization such as an AI/AN cultural and/or service center that can
593 offer culturally appropriate services to Native American children and their
594 families in close proximity to the Native American child, parent, or Native
595 American custodian? Are these services designed to prevent removal or reunify
596 Native American families?
 - 597 5. Is the Native American child's Tribe able and willing to provide services that
598 eliminate the risk factors that prevent the child from living safely at home?
 - 599 6. Is there a contract provider who has access to culturally American Indian
600 programs and/or resources?
601
- 602 D. To reduce the potential for cultural bias when evaluating home and family conditions
603 and making decisions affecting Native American children and families, the Child and
604 Family Services caseworker should involve the Tribe and Native American organizations
605 at the earliest possible point of intervention.
606
- 607 E. Services in the community specifically designed for Native American families are to be
608 used where available, including resources of the extended family, the Tribe, urban
609 Native American organizations, Tribal family service programs and individual Native
610 American caregivers, e.g., medicine men or women, and other individual Tribal
611 members who may have developed special skills that can be used to help the child's
612 family succeed.
613
- 614 F. In order to demonstrate that "active efforts" have been made, the Child and Family
615 Services caseworker must assure that due consideration has been given to the cultural
616 needs and values of the family and that resources have been diligently sought to
617 provide family services.
618

619 **705.11 Active Efforts Versus Reasonable Efforts**

620 Major objectives:

621 The Child and Family Services caseworker will extend to the American Indian/Alaska Native
622 families an intense level of services to be sure to satisfy ICWA.
623

624
625 **Applicable Law**

626 Utah Code Ann. [§62A-4a-105](#). Division responsibilities.
627

628 Practice Guidelines

629 Definition of Active Efforts – Active efforts mean not just an identification of the problems or
630 solutions, but efforts showing an active attempt to assist in bridging the gap.
631

- 632 A. Do caseworkers consider cultural conditions and way of life of the child's Tribe and/or
633 Native American community in making judgments about the family?
634
- 635 B. Do caseworkers intervene only when supported by relevant, prevailing Native American
636 social and cultural standards regarding intervention in familial relationships by non-
637 family?
638
- 639 C. Do caseworkers develop a case plan with assistance of parent/custodian that involves
640 use of Tribal Native American community resources?
641
- 642 D. Do caseworkers encourage maintenance of the child in his or her family except where
643 physical or emotional harm may result?
644
- 645 E. Do caseworkers involve the child, if of sufficient age, in the design and implementation
646 of case plan?
647
- 648 F. Do caseworkers provide time and resources to prevent family breakup in at least equal
649 measure to time and resources provided to other families?
650
- 651 G. Do caseworkers assist parents or custodian and child to maintain an ongoing familial
652 relationship?
653

654 **705.12 Termination Of Parental Rights**

655 Major objectives:

656 Child and Family Services will recognize the unique nature of termination proceedings when
657 AI/AN child is involved. Child and Family Services as petitioner must show the court by evidence
658 beyond a reasonable doubt, including the testimony of one or more qualified expert witnesses,
659 that continued custody of the child by the parent or Native American custodian is likely to result
660 in serious emotional or physical damage to the child.
661

662
663 **Applicable Law**

664 25 U.S.C. §1912(f)

665 The termination of parental rights standard set forth in 25 U.S.C. §1912(f) of ICWA requires
666 evidence beyond a reasonable doubt.
667

668 Practice Guidelines

- 669 A. Only where the standard can be satisfied that serious emotional or physical damage is
670 likely to result to the child would termination of parental rights be appropriate and
671 adoption a potentially appropriate plan for the Native American child.
672
- 673 B. The testimony of qualified expert witnesses is required by the ICWA.
674
- 675 C. When the ICWA termination standard cannot be met, the permanency plan will need to
676 provide for a different option (e.g., a long-term guardianship, a relative placement, or
677 continued efforts at reunification).
678
- 679 D. Where a parent is making progress toward reunification by the time of the 12-month
680 hearing, it may be appropriate to continue reunification as the permanency goal.
681
- 682 E. Any permanency plan developed for a Native American child that provides for out-of-
683 home placement, including an adoptive placement, must comply with the placement
684 preferences outlined in 25 U.S.C. §1915.
- 685 1. The child must be placed in a manner consistent with the foster/pre-adoptive
686 placement preferences established by ICWA, which are:
- 687 a. Member of the child's extended family;
688 b. Foster home licensed, approved, or specified by the Native American
689 child's Tribe;
690 c. Native American foster home licensed or approved by an authorized non-
691 Native American; or

- 692 d. An institution for children approved by a Native American Tribe or
693 operated by a Native American organization that has a program suitable
694 to meet the child needs.
- 695 2. In any adoptive placement, preference will be given, in absence of good cause to
696 the contrary, to a placement with:
- 697 a. A member of the child's extended family;
698 b. Other members of the Native American child's Tribe; or
699 c. Other Native American families.
700

701 **705.13 Qualified Native American Expert Witness**

702 Major objectives:

703 The Child and Family Services caseworker will enlist a qualified Native American expert witness
704 who is experienced and knowledgeable about Indian culture, childrearing practices, and
705 traditions to render an opinion as to whether a Native American child is suffering from some
706 form of physical or emotional harm because of the behavior of the family.
707
708

709
710 **Applicable Law**

711 25 U.S.C. §1912(e) and (f)

712 The testimony of qualified Native American expert witnesses is required by ICWA before a
713 foster care placement or a termination of parental rights may be ordered.
714

715 Practice Guidelines

- 716 A. Child and Family Services caseworkers will:
- 717 1. Enlist the state ICWA specialist to serve as an expert witness or contact to help
718 locate a qualified expert witness.
- 719 2. Enlist the assistance of the Native American child's Tribe in locating persons
720 qualified to serve as expert witnesses.
- 721 3. Enlist the assistance of the closest Bureau of Indian Affairs area office in locating
722 persons qualified to serve as expert witnesses.
- 723 4. Contact official reservation Tribal organizations or urban Native American
724 programs that serve children and families to locate potential expert witnesses.
725
- 726 B. "Qualified expert witnesses" who are routinely relied on in ICWA hearings include:
- 727 1. A member of the Native American child's Tribe who is recognized by the Tribal
728 community as knowledgeable in Tribal customs as they pertain to family
729 organization and child-rearing practices.
- 730 a. Medicine men;
731 b. Medicine women;

- 732 c. Tribal leaders;
733 d. Tribal ICWA specialist.
734 2. A lay person having substantial education and experience in the area of his or
735 her specialty along with substantial knowledge of prevailing social and cultural
736 standards and childrearing practices within the Native American child's Tribe.
737 a. Native American child welfare workers;
738 b. Day care workers;
739 c. Bureau of Indian Affairs resource: knowledge of customs and culture of
740 Tribes they serve;
741 d. Tribal ICWA specialist;
742 e. State ICWA specialist.
743 3. A professional person having substantial education and experience in the area of
744 his or her specialty along with substantial knowledge of prevailing social and
745 cultural standards and childbearing practices within the community.
746 a. Psychologists;
747 b. Psychiatrists;
748 c. Social workers;
749 d. State ICWA specialist.
750

751 705.14 Recognition Of Tribal Licensing And/Or Approval Of Standards For 752 Foster Homes

753 Major objectives:

754 Child and Family Services will recognize full faith and credit of an Indian Tribe's licensure of a
755 Tribal foster home located on state lands and within Indian country. ~~[within and outside Native~~
756 ~~American country that are certified, approved, or licensed as meeting the foster home licensing~~
757 ~~requirements under state law.]~~
758

759 **Applicable Law**

760 Utah Code Ann. [§62A-2-117](#). Licensure of Tribal foster homes.

761 25 U.S.C. §1901-1963

762 The ICWA provides that Tribes may develop and implement Tribal foster home standards. The
763 office will continue to license Tribal foster homes according to standards developed and
764 approved by the Tribe or the Tribe may develop their own Tribal licensing standards.
765
766

767 Practice Guidelines

- 768 A. If the Tribe has not developed their own licensing standards, the office will license Tribal
769 foster homes pursuant to this chapter.
770

- 771 B. ~~Utah Foster Care currently recruits and trains Native American foster families and~~
772 ~~coordinates with Utah Tribes to increase recruitment efforts. [Many regional offices will~~
773 ~~want to make greater efforts and work more cooperatively with Tribes to recruit Native~~
774 ~~American foster care and adoptive homes, and to encourage Tribes to develop~~
775 ~~programs to recruit and license Native American foster care and adoptive homes.]~~
776

777 **705.15 Higher Standards Of Proof**

778 Major objectives:

779 Child and Family Services will recognize these higher standards and will seek to meet the
780 standards when taking custody of an AI/AN child.
781

782 **Applicable Law**

783 25 U.S.C. §1901-1963

784 ICWA mandates higher standards of proof in child custody proceedings involving AI/AN children
785 than the state's requirements in those cases involving non-Native American children.
786

787 Practice Guidelines

788 Through ICWA, Congress declared that a Native American child may not be removed simply
789 because there is someone else willing to raise the child who is likely to do a better job or
790 because it would be "in the best interests of the child" for him or her to live with someone else.
791 Nor can a placement or termination of parental rights be ordered simply based on a
792 determination that the parents or custodians are "unfit parents." It must be that it is
793 dangerous for the child to remain in his or her present conditions.
794

795 **705.16 Out-Of-Home Placement Of Native American Children**

797 Major objectives:

798 Child and Family Services caseworkers will give preference to the foster and pre-adoptive
799 placements, unless the Native American child's Tribe has established a different order of
800 placement. The caseworker should also contact the Tribe to discuss Tribal placement
801 preferences as early as possible in case development.
802

803 **Applicable Law**

804 25 U.S.C. §1915(d)

805 The preferences and standards recognized are the prevailing social and cultural standards of
806 the Native American community in which the parent or extended family resides or with which
807 the parent or extended family maintains social and cultural ties.
808

809

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

815

816 Practice Guidelines - Documentation

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

820

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

824

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

826

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

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

831 b. Efforts were made to counsel and change the parents' behavior, but they did not
832 work.

833

834 Practice Guidelines - Foster Care/Kinship And Adoptive Placements

835 A. ICWA requires:

836 1. The child must be placed in the least restrictive setting available, 25 U.S.C.
837 §1915(b).

838 2. The child must be placed in reasonable proximity to the child's permanent home,
839 25 U.S.C. §1915(b).

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

842

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

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

846 2. Foster home licensed, approved, or specified by the Native American child's
847 Tribe.

848 3. Native American foster home licensed or approved by an authorized non- Native
849 American.

-
- 850 4. An institution for children approved by a Native American Tribe or operated by a
851 Native American organization that has a program suitable to meet the child's
852 needs.
- 853
- 854 C. In any adoptive placement, preference will be given, in absence of good cause to the
855 contrary, to a placement with:
- 856 1. A member of the child's extended family.
- 857 2. Other members of the Native American child's Tribe.
- 858 3. Other Native American families.
- 859
- 860 D. The Child and Family Services caseworker should:
- 861 1. Contact the Tribe to ask if they have a different placement preference than those
862 set forth in ICWA.
- 863 2. Ask the Tribal social worker about concurrent planning options early in the case.
- 864 3. File appropriate documents to show that a diligent search was undertaken to
865 follow ICWA's placement preference.
- 866 4. Contact the Tribe's social service office for input.
- 867 5. Establish contact with the child's extended family.
- 868 6. Conduct a search of state and county lists of available Native American homes.
- 869 7. Contact other Tribes and Native American organizations with available
870 placement resources.
- 871
- 872 E. Documentation that must be in the record.
- 873 1. If the placement is outside the preferences established by ICWA, the record must
874 document the reason.
- 875 2. If any party believes that good cause exists to place the child outside the
876 placement preferences, the reasons for that belief must be documented in the
877 record
- 878 3. If there is a finding(s) in a court order of good cause to place a child outside the
879 placement preferences of ICWA, the reasons must be documented in the record
880

881 Practice Guidelines - Voluntary Placements And Adoptions

- 882 A. ICWA applies to voluntary placements involving public and private agencies. For valid
883 consent to be given, the following conditions must be met:
- 884 1. The child is over 10 days old.
- 885 2. The consent is in writing and recorded before a judge.
- 886 3. The consent is accompanied by the judge's certification that the terms and
887 consequences of the consent were fully explained in detail and fully understood
888 by the Native American parents or Native American custodian.
889

- 890 B. §1913(b) of the ICWA grants a parent or Native American custodian the right to
891 withdraw consent to the termination of parental rights prior to the entry of the final
892 order of termination.
893
- 894 C. Consent should be obtained from both parents. If not, the non-consenting parent's
895 rights must be terminated involuntarily in accordance with ICWA.
896
- 897 D. If the case involved an unwed father and the father sought to acknowledge or establish
898 paternity, the state should acknowledge that paternity.
899
- 900 E. The consent signed by the Native American parents or custodians should contain:
901 1. Name and birth date of child.
902 2. Name of child's Tribe.
903 3. Child's enrollment number or other indication of membership in the Tribe.
904 4. Name and address of consenting parents of Native American custodian.
905 5. Name and address of prospective parents, if known, for substitute care
906 placements.
907 6. Name and address of person or agency through which placement was arranged,
908 if any, for adoptive placements.
909 7. Parents' right to withdraw consent from termination and regain custody of child
910 before entry of official order.
911 8. Parents'/Native American custodian's right to be notified if the adoption is set
912 aside or vacated or otherwise unsuccessful and the right to petition court for
913 custody.
914 9. A statement of the parents' right for parental consent to be signed in closed
915 court.
916

917 **705.17 Change Of Placements**

918 Major objectives:

919 The Child and Family Services caseworker will notify the parent and/or Native American
920 custodian and the child's Tribe in writing prior to a change in placement or before the foster
921 family moves.
922

923 **Applicable Law**

924 Utah Code Ann. [§62A-4a-105](#). Division responsibilities.
925

926 Practice Guidelines

927 If an AI/AN child in a foster or pre-adoptive placement is to be moved from one placement
928 setting to another or if the foster family moves (requiring a change in placement) the
929

930 placement preferences will be followed, unless the child is returned to the parent or Native
931 American custodian from whose custody the child was originally removed.

932

933 **705.18 Records Of Placement**

934

Major objectives:

935

936 Child and Family Services will maintain a written record of each placement of each Native
937 American child and of the efforts to comply with the placement preferences established by
938 ICWA.

939

Applicable Law

940

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

942

Practice Guidelines

943

944 A. Written record of placement. This record will be maintained in SAFE, separate from the
945 court report, and will contain, at a minimum, the petition or complaint, all substantive
946 orders entered during the proceeding, and the complete record of the placement
947 determination.

948

949 B. Where the placement does not meet the preference priorities, the efforts to find
950 suitable placement within those priorities will be recorded and documented in detail.
951 Documentation will also be provided showing that the placement chosen is in the least
952 restrictive setting possible, meets the child's special needs, and as much as possible, in
953 cases of foster care placement, is close to the child's own home.

954

955 C. At any time, upon the request of the Native American child's Tribe or the Department of
956 the Interior, Child and Family Services will make available records of every foster care,
957 pre-adoptive, and adoptive placement of each Native American child maintained by
958 Child and Family Services.

959

960 **705.19 Involuntary Adoptive Placements**

961

Major objectives:

962

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

964

Applicable Law

965

966 25 U.S.C. §1915(a)

967

967 §1915(a) of the ICWA outlines the adoptive placement preferences:

968

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

969

969 2. Other members of the Native American child's Tribe.

970 3. Other Native American families.

971

972 Practice Guidelines

973 A. The Tribe has the authority under §1915(c) to establish, by resolution, a different order
974 of preference.

975

976 B. The county/state or court effectuating the placement must follow the Tribe's alternate
977 preference order as long as it is the least restrictive setting appropriate to the particular
978 needs of the child.

979

980 C. Where appropriate, the Native American child's preference or parents' preferences will
981 be considered.

982

983 D. Where a consenting parent requests anonymity, the court or state agency will give
984 weight to the parent's request in applying the preferences.

985

986 E. The Child and Family Services caseworker should contact the Tribe very early to ask if
987 they have a different placement preference than those set forth in the ICWA.

988

989 F. Documentation that must be in the record:

990 1. If any party believes that good cause exists to place the child outside the
991 placement preferences, the reasons for that belief must be documented in the
992 record.

993 2. If there is a finding(s) in a court order of good cause to place a child outside the
994 placement preferences of ICWA, the reasons must be documented in the record.

995

996 **705.20 Disrupted Adoptive Placements**

997

998 Major objectives:

999 Child and Family Services will notify the Tribal authorities in the event of an adoption disruption.

1000

1001

1002 **Applicable Law**

1003 25 U.S.C. §1912

1004 The notice should include a statement of their right to return of their child and such petition
1005 should be supported by Child and Family Services unless it can be demonstrated that it is not in
1006 the child's best interest as defined by 25 U.S.C. §1912.

1007

1008 Practice Guidelines

1009 Documentation:

- 1010
1011 A. Written records are to be maintained on each Native American child, separate from the
1012 court record, of all placements and efforts exerted to comply with required placement
1013 preferences provisions of ICWA.
1014
1015 B. The record should contain:
1016 1. The petitions or complaint;
1017 2. All substantive orders entered;
1018 3. Complete record of placement determination.
1019
1020 C. 25 U.S.C §1915(b) Upon request, the placement records will be made available to the
1021 Native American child's Tribe or the Secretary of the Interior.
1022
1023 D. Where required placement preferences have not been followed, make sure efforts to
1024 fine suitable placements within those priorities are documented in detail.
1025

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

- 1036 A. The Child and Family Services caseworker should openly consult with the Tribal social
1037 worker to develop case planning.
1038
1039 B. ~~Child and Family Services will make available all relevant records to the Indian child's
1040 Tribe or Secretary of the Interior. [Upon request, the placement records will be made
1041 available to the Native American child's Tribe or the Secretary of the Interior.]~~
1042
1043 C. Confidentiality and protection of children and adults should be considered and
1044 addressed when providing documents.
1045

1046 **705.22 Full Faith And Credit For Public Acts, Records, And Judicial**
1047 **Proceedings Of Tribes**

1048
1049 Major objectives:

1050 Child and Family Services will recognize its responsibility to give full faith and credit to the public
1051 acts, records, and judicial proceedings of any Native American Tribe with regard to Native
1052 American custody proceedings.

1053
1054 **Applicable Law**

1055 25 U.S.C. §1911(D)

1056 The United States, every state, every territory or possession of the United States, and every
1057 Native American Tribe will give full faith and credit to the public acts, records, and judicial
1058 proceedings of any Native American Tribe applicable to Native American child custody
1059 proceedings to the same extent that such entities give full faith and credit to the public acts,
1060 records, and judicial proceedings of any other entity.

1061
1062 **705.23 ICWA Training**

1063
1064 Major objectives:

1065 Regions, contractors, and individual workers will receive on a regular and ongoing basis training
1066 regarding the intent and application of the ICWA. Child and Family Services will encourage
1067 other regular participants in the system to obtain or to participate in such training.

1068
1069
1070 **Applicable Law**

1071 Utah Code Ann. [§62A-4a-105](#). Division responsibilities.

1072
1073 Practice Guidelines

- 1074 A. The state ICWA specialist will set forth a format for training to improve the
1075 understanding of ICWA, which will provide a solid working knowledge of ICWA.
1076
1077 B. The state ICWA specialist will coordinate with the state training coordinator to
1078 integrate/ICWA into existing and ongoing training for state employees.
1079
1080 C. The state ICWA specialist will coordinate joint training and dialogue with state and Tribal
1081 child welfare agencies and court personnel to strengthen existing working relationships.
1082