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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

Practice Guidelines

A. Agreements between states and American Indian/Alaska Native Tribes:

- 80 1. The first step in applying the ICWA is to become familiar with the
81 provisions of the Tribal-state agreements, state laws, or principles. The
82 state of Utah presently has agreements with the Navajo Nation and the
83 Ute Indian Tribe.
- 84 2. State law or Tribal agreements establish a higher standard of protection
85 for Native American parents than ICWA, and that higher standard must be
86 followed.
- 87
- 88 B. Determine ICWA applicability:
- 89 1. ICWA applies to “child custody proceedings” in state courts. A “child
90 custody proceeding” is defined as 25 U.S.C. §1903(1), to include: Foster
91 care placements; termination of parental rights; pre-adoptive placements;
92 and adoptive placements.
- 93 2. Proceedings covered by ICWA:
- 94 a. Foster care placements, 25 U.S.C. §1913(a) and §1912(e);
95 b. Termination of parental rights, 25 U.S.C. §1903(1)(ii);
96 c. Pre-adoptive placements, 25 U.S.C. §1903(1)(iii);
97 d. Adoptive placements (includes conversion from foster care to
98 adoptive placement), 25 U.S.C. §1903(1)(iv);
99 e. Both voluntary and involuntary placements;
100 f. Divorce proceedings in which neither parent will get custody;
101 g. Any transfers of placement;
102 h. Juvenile delinquency proceedings where parental rights may be
103 terminated;
104 i. Status offenses (juvenile delinquency proceedings that involve an
105 offense that would not be a crime if committed by an adult, e.g.,
106 drinking, runaway, truancy, etc.).
- 107
- 108 3. Proceedings NOT Covered by ICWA:
- 109 a. Juvenile delinquency proceedings involving violations of criminal
110 law;
111 b. Divorce proceedings where one parents is granted custody, 25
112 U.S.C. §1903(1).
- 113

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

123 Native American Tribe and is the biological child of a member of a Native American
124 Tribe, (4). As a sovereign nation, it is the Tribe that determines membership. A Tribe's
125 determination regarding membership or eligibility for membership is final, conclusive,
126 and binding on the courts.

127

128 Practice Guidelines

129 A. Inquire at Intake in **ALL** cases whether the child/parents are American
130 Indian/Alaska Natives (AI/AN). This is important because ICWA requires that
131 "active efforts" be made to provide "remedial services and rehabilitative programs
132 designed to prevent the breakup of the Native American family..." 25 U.S.C.
133 §1912(d). If AI/AN children are not properly identified early in a case, it is
134 unlikely that the active efforts requirement will be met

135

136 B. Inquire whether the child/parents are AI/AN at **ALL** stages of the case following
137 Intake. This should include every court hearing and at every change or potential
138 custody change.

139 1. This will facilitate the proper management of ICWA cases at an earlier
140 point in the permanency planning process.

141 2. It will eliminate the sudden "surprise discovery" that there is a Native
142 American child involved.

143

144 C. If the child's parents are unavailable or unable to provide a reliable answer
145 regarding the Native American heritage of their child, the Child and Family
146 Services caseworker will consider the following in determining the child's Native
147 American heritage:

148 1. A thorough review of all documentation in the file, including contact with
149 previous workers.

150 2. Consultation with relatives/collaterals providing information that suggests
151 the child/parent may be American Indian.

152 3. Examination of any other information bearing on the determination of the
153 child's Native American heritage, such as communication from other
154 sources including Native American Tribes and organizations.

155

156 D. Upon receiving protective custody of an AI/AN child residing outside the
157 boundaries of the reservation, the Child and Family Services caseworker will:

158 1. Contact and staff the case with the state ICWA specialist.

159 2. Inform the Assistant Attorney General that there is reason to believe that
160 the child is a Native American child and subject to the requirements of the
161 ICWA prior to initiating a petition. This will ensure that proper federal
162 requirements of the ICWA and associated procedures are followed.

163 3. Advise the Tribal/Nation's ICWA representative through notice of taking
164 protective custody of the AI/AN child.

-
- 165 a. A Child and Family Services caseworker should establish Tribal
166 contact as early as possible in an ICWA case.
- 167 b. Child and Family Services caseworkers must work in partnership
168 with Tribal social workers throughout the course of a child custody
169 proceeding involving a Native American child. Having the Tribe's
170 social worker and Tribal attorney on board at the beginning of the
171 case sets the stage for assistance, advice, positive conjoint efforts,
172 Tribal intervention, possible transfer of the case, the sharing of
173 critical, culturally relevant resources and information, and maximum
174 input on placement decisions.
- 175 c. Child and Family Services caseworkers should continually maintain
176 contact with Tribal social workers.
- 177
- 178 E. Child and Family Services will gather the following information, if available, from
179 the child or parent or Native American custodian and any other person with
180 knowledge of the child or parent's Tribal affiliation. The information will assist in
181 the confirmation or determination of Tribal membership:
- 182 1. The name of the Tribe or Tribes that the child and parent are a member of
183 or eligible for membership in.
- 184 2. The Tribal enrollment certification, identification numbers, or other
185 documents that show the child and/or parent(s) are a member or eligible
186 for membership in a Tribe.
- 187 3. The birth mother's maiden name, and names of the maternal and paternal
188 grandparents and biological and/or legal father(s).
- 189 4. Birth dates and birthplaces of the child and parent(s).
- 190 5. Social Security Numbers of the child and parent(s).
- 191 6. Degree of Indian Blood and/or Certificate of Indian Blood (CIB) of child
192 and parent(s).
- 193 7. If either birth parent was adopted, obtain the name of his or her birth
194 parents (if available).
- 195 8. Other information about extended family members including dates of birth
196 and addresses of grandparents, aunts, uncles, cousins, great
197 grandparents, stepparents, and first and second cousins.
- 198
- 199 F. When the child's Tribe has been identified and the above information gathered
200 and documented in SAFE, the Child and Family Services caseworker will contact
201 (by letter or phone) the Tribe's membership/enrollment office to ask them to
202 make a determination whether the child is a member or eligible for membership
203 in the Tribe. If the child is connected to more than one Tribe, all of the relevant
204 Tribes must be contacted.
- 205 1. "Member" is defined by some Tribes as a descendent and does not equal
206 enrollment.
- 207 2. Formal notice to the Tribe regarding the court process is still required.

-
- 208 3. The Tribal worker will work with the Child and Family Services caseworker
209 once the Tribe is notified and throughout the case process.
210
- 211 G. If the Tribe does not respond, call the Tribal enrollment officer or other Tribal
212 employees or officials responsible for, or knowledgeable about, Tribal
213 membership.
214 1. Several follow-up calls may be necessary as many of the Tribes are
215 understaffed.
216 2. Follow the call with a certified letter documenting the conversation.
217
- 218 H. If the Tribe responds that the child is not an enrolled member, but is eligible for
219 membership and the biological child of a member of a Native American Tribe, the
220 Child and Family Services caseworker will:
221 1. Request (or assist the family in completing) Tribal membership application
222 forms for the child.
223 2. Encourage the child's parents or Native American custodian to enroll the
224 child in the Tribe to facilitate cultural ties and establish eligibility for
225 potential Tribal benefits.
226
- 227 I. Once a Tribe has determined that a child is not a member and not eligible for
228 membership enrollment, ICWA does not apply. The Child and Family Services
229 caseworker will:
230 1. Document all steps taken to determine the child's Native American or
231 Tribal ancestry.
232 2. File the Tribe's written statement declaring that the child is neither a
233 member of the Tribe nor eligible for membership (and the biological child
234 of a member of a Native American Tribe).
235 3. Incorporate in any court hearing the Tribe's written statement declaring
236 that the child is neither a member of the Tribe nor eligible for membership
237 (and the biological child of a member of a Native American Tribe).
238
- 239 J. If the Tribe determines the child is a member or is eligible for membership and
240 the biological child of a member of a federally recognized Tribe, ICWA APPLIES.
241 1. Some Tribes define descendants as "members" for ICWA services. Child
242 and Family Services caseworkers must follow ICWA whenever a Native
243 American child is determined to be a "member" of a Tribe.
244 2. If the child was determined to be covered by ICWA (or if eligibility is not
245 yet determined) and there are past or pending custody proceedings, the
246 case must be treated as an ICWA case and is subject to ICWA
247 procedures until the child is determined to be non-Native American.
248
- 249 K. The Child and Family Services caseworker should document in SAFE:
250 1. All inquiries (oral or written) regarding the child's ethnicity.

- 251
252 L. When the child was initially determined to be Native American, the Child and
253 Family Services caseworker should also document::
254 1. Family history chart.
255 2. Tribal enrollment number.
256 3. Tribal ID card.
257 4. Certificate of Degree of Indian Blood (CIB).
258 5. Other evidence such as a letter from the Tribe, Bureau of Indian Affairs.
259 6. Documentation from the Indian Health Service, medical clinic or school,
260 etc.
261

262 705.4 Emergency Removal Of A Native American Child

263 Major objectives:

264 When there is an emergency removal, the Child and Family Services caseworker will
265 immediately cause an inquiry to be made as to the residence and domicile of the child.
266
267

268 **Applicable Law**

269 25 U.S.C. §1915

270 If the child is believed to be Native American, the Child and Family Services caseworker
271 must undertake diligent efforts to place the child during emergency care in a setting that
272 complies with the placement preference set forth in §1915(b) or (c) of the ICWA
273 (including cases involving emergency placements).
274

275 Practice Guidelines

- 276 A. After making a removal, the following conditions must be immediately considered
277 unless circumstances do not permit such inquiry, and the Native American status
278 of the child must be immediately determined:
279 1. If the child is Native American, the name of the Tribe and/or band must be
280 determined and the Tribe must be contacted.
281 2. It is determined by the Tribe that has jurisdiction over the child custody
282 proceedings whether the child is domiciled on the reservation.
283 3. It is determined that the child is in danger of imminent physical danger or
284 harm.
285 4. Determining the status of a Native American child:
286 a. A member of the Native American child's extended family;
287 b. A foster home licensed, approved, or specified by the Native
288 American child's Tribe;
289 c. A Native American foster home licensed or approved by an
290 authorized non-Native American licensing authority; or
291 d. An institution for children approved by a Native American Tribe or
292 operated by a Native American organization that has a program
293 suitable to meet the child's needs.

-
- 294
295 B. The Native American child's Tribe has the right to establish a different order of
296 placement preferences, and the state court is required to follow the order as long
297 as it is the least restrictive setting appropriate to the particular needs of the child.
298
299 C. Where appropriate in foster care placements, the preference of the Native
300 American child or parent is to be considered.
301
302 D. Where a consenting parent requests anonymity, the state court or state will give
303 weight to the parent's request in applying the placement preferences (25 U.S.C.
304 §1915(c)).
305
306 E. Emergency custody is terminated when:
307 1. Removal is no longer necessary to prevent imminent physical damage or
308 harm to the child.
309 2. The appropriate Tribe exercises jurisdiction over the case.
310
311 F. If termination of an emergency removal is not possible, a court order should be
312 obtained authorizing continued protective custody.
313
314 G. The Child and Family Services caseworker will obtain the following information
315 for inclusion in the petition:
316 1. The name, age, Tribal affiliation, and last known address of the Native
317 American child.
318 2. The name and address of the child's parents, Native American custodian
319 (if any), and the Tribe(s).
320
321 H. If the name and location of the child's parents, Native American custodian (if
322 any), or Tribe is unknown, the Child and Family Services caseworker should
323 document the diligent efforts undertaken to obtain this information.
324
325 I. If the name and location of the parent, Native American custodian, or Tribe is
326 known, the Child and Family Services caseworker must obtain from the Tribe
327 whether the residence or domicile of the parent, Native American custodian, or
328 child is on or near a reservation, and identify the reservation.
329
330 J. Develop a specific and detailed account of the circumstances that led to the
331 conclusion that the child would suffer imminent physical damage or harm. These
332 facts should be well documented.
333

- 334 K. Set forth a specific plan of action describing the “active” reunification efforts that
335 have been undertaken and which are planned to restore the child to his or her
336 parents or Native American custodian.
337
- 338 L. Develop a specific plan of action to physically transfer the child to the jurisdiction
339 of the appropriate Native American Tribe pursuant to 25 U.S.C. §1911(b), in
340 cooperation with the Tribal social worker.
341

342 705.5 Notice

343 Major objectives:

344 Child and Family Services must send notice to the Tribe(s), the parents, and the Native
345 American custodian whenever a child custody proceeding is initiated.
346

347 **Applicable Law**

348 25 U.S.C. §1912(a)

349 Formal notice of custody proceedings is required by §1912(a) of the ICWA. Congress,
350 in enacting ICWA, recognized that the Tribe has a direct interest in its children. The
351 Tribe is entitled to notice as a party, because, from a Native American perspective, a
352 child is a sacred and precious resource that belongs to the entire Tribe.
353

354 Practice Guidelines

- 355 A. No foster care placement or termination of parental rights proceeding may be
356 held until the Tribe(s), parents, and Native American custodian have received
357 proper notification and ICWA timelines have been followed.
358
- 359 B. There are specific timelines set forth in §1912(a) of ICWA. This provision states
360 that a custody proceeding cannot go forward until:
361
- 362 1. At least 10 days after receipt of notice by the parents or Native American
363 custodian, or after 30 days if 20 additional days are requested by the
364 parents or custodian to prepare for the proceedings.
 - 365 2. At least 10 days after receipt of notice by the Tribe, or after 30 days if the
366 Tribe requests an additional 20 days to prepare for the proceeding.
 - 367 3. At least 15 days after receipt of notice by the Secretary of the Interior
368 (Bureau of Indian Affairs) if the identity or location of the parent or Native
369 American custodian and the Tribe cannot be determined.
370
- 371 C. Those to receive the ICWA notice of each proceeding are:
- 372 1. Parents.
 - 373 2. Native American custodian, if any.
 - 374 3. Tribe.
 - 375 4. Additional Tribes (if the child is affiliated with or eligible for membership in
376 more than one Tribe, all Tribes should receive notice).

- 377 5. Bureau of Indian Affairs in Washington, D.C. as well as the appropriate
378 Bureau of Indian Affairs area office if identified/location of parents or
379 custodians cannot be determined.
380
- 381 D. Notice is served by the following:
- 382 1. Notice may be provided by registered mail, returned receipt requested.
383 2. Notice must be filed with the court, along with any returned receipts or
384 other proof of service.
385 3. The case files must be properly documented regarding proof of service.
386 4. Even if the Tribe does not respond, an official notice is sent of every future
387 proceeding.
388 5. Even if a Tribe replies that it does not wish to intervene in the proceeding,
389 notices of every future proceeding are sent.
390 6. Determination must be made that the parent was proficient in the English
391 language.
392 7. If there is a reason to believe that the parent or Native American custodian
393 will not understand the notice because of possible limited English
394 proficiency, a copy of the notice must be sent to the Bureau of Indian
395 Affairs Area Office nearest to the residence of that person, and a request
396 must be made to the Bureau of Indian Affairs staff to arrange to have the
397 notice explained to that person in the language that he or she best
398 understands. The written request must be properly documented in the
399 case file.
400 8. If a person is assigned to explain the notice to the parent or Native
401 American custodian in the language that is best understood, the details of
402 the assistance rendered must be documented in the case file.
403

404 705.6 American Indian/Alaska Native Parent Or Indian Custodian 405 Rights To Legal Counsel

406 Major objectives:

407 The Child and Family Services caseworker will, at the earliest point in the case, advise
408 the parents or Native American custodian of their right to court-appointed legal counsel.
409

411 **Applicable Law**

412 25 U.S.C. §1912(b)

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

416 Practice Guidelines

- 417 A. Inform the AI/AN parents or Native American custodian of the procedures that
418 must be followed to have legal counsel appointed.
419

- 420
421 B. The right to counsel applies in proceedings initiated by the state and those
422 initiated by private parties, such as stepparent adoption proceedings and
423 intrafamily disputes.
424
425 C. The right to counsel also extends to pre-adoptive and adoptive placement
426 preferences.
427

428 **705.7 Jurisdiction**

429 Major objectives:

- 430
431 A. In every case involving a Native American child, the Child and Family Services
432 caseworker must routinely ask the child's Tribe whether the child is a ward of the
433 Tribal court under any prior Tribal court proceedings.
434
435 B. Once it is determined that a case is a child custody proceeding under ICWA and
436 that the child is Native American, it must then be determined which court has
437 jurisdiction.
438

439 **Applicable Law**

440 25 U.S.C. §1911(a) and (d)

- 441 A. Exclusive jurisdiction is vested with the Tribal court over any child custody
442 proceeding involving a Native American child who:
443 1. Resides or is domiciled within the reservation or is a ward of the Tribal
444 court, regardless of the child's domicile.
445 2. If an order establishing Tribal court wardship is currently in force, the state
446 court must accord full faith and credit to any Tribal court orders, records,
447 and judicial proceedings.
448

449 Practice Guidelines

- 450 A. Concurrent jurisdiction lies with the Tribal and state court when a child resides or
451 is domiciled off the reservation and the child is not a ward of the Tribal court.
452
453 B. A foster care placement or termination of parental rights proceeding may be
454 transferred to Tribal court under §1911(b) of ICWA absent:
455 1. The Tribal court's declination of the case.
456 2. "Good cause" to the contrary.
457 3. Objection by a parent.
458
459 C. Some Tribes might decline jurisdiction due to limited resources (e.g., no Tribal
460 court, or limited medical or mental health services). If a Tribe declines
461 jurisdiction, Child and Family Services will still give notice to the Tribe.
462

- 463 D. In every case involving an AI/AN child, the Child and Family Services caseworker
464 will:
- 465 1. Work closely with the Assistant Attorney General and Tribal Attorney to
466 clarify initial jurisdiction.
 - 467 2. Ask the Tribal social worker early in the case whether the Tribe would like
468 the jurisdiction to be transferred to their Tribal court.
 - 469 3. Work closely with the Tribal social worker, if the Tribe accepts transfer of
470 the case, to coordinate appropriate legal documents required by the state
471 court to effectuate the transfer and to make arrangements for the physical
472 transfer and delivery of the child.
 - 473 4. Continue to involve the Tribal social worker, even when a Tribe declines
474 transfer of a case. The Tribal social worker can play a significant role in
475 the concurrent planning process for the long-term well-being of the child.
476

477 **705.7.1 Transfer Of Jurisdiction To An Indian Tribe With A Title IV- 478 E Agreement**

479 Major objectives:

480 It is important to provide essential documents and information to the Tribe that are
481 necessary to continue an Indian child's eligibility under Title IV-E and Medicaid
482 programs under Title XIX and provide for continuity of care when the child's case is
483 transferred to Tribal jurisdiction where Title IV-E benefits can continue.
484

485 Practice Guidelines

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

- 504 3. All documents that the state has that relates to the child's IV-E eligibility or
505 potential eligibility for other federal benefits such as death benefits, WIC,
506 Headstart and others.
507 4. A copy of the current Child and Family Services Plan developed with the
508 Child and Family Team, a list of the members of the Child and Family
509 Team with contact information, and minutes from the Child and Family
510 Team Meeting used to develop that plan.
511 5. The Health Report from SAFE that includes all health care information
512 about the child recorded by Child and Family Services.
513 6. Any educational records of the child, including school enrollment
514 information.
515 7. Information on all placements that the child has had in the current out-of-
516 home care episode including the most recent provider's contact
517 information and a copy of their foster care license including the expiration
518 date of the license.
519
520 B. Once the packet is complete, the caseworker will contact the Tribal worker at the
521 Tribe and notify him or her that the packet will be sent and confirm address
522 information for the Tribal worker. The packet will then be sent to the Tribal
523 worker.
524

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

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

- 547
548 D. Tribal recommendations should be documented in the case file and court reports.
549

550 **705.9 Transfer To Tribal Court**

551 Major objectives:

552 Child and Family Services will advise parents or Native American custodian that ICWA
553 allows the parent or Native American custodian or Native American Tribe to transfer the
554 proceeding to Tribal court.
555

556 **Applicable Law**

557 25 U.S.C. §1911(a) and (d)

- 558 A. Exclusive jurisdiction is vested with the Tribal court over any child custody
559 proceeding involving a Native American child who:
560
561 1. Resides or is domiciled within the reservation or is a ward of the Tribal
562 court, regardless of the child's domicile.
563 2. If an order establishing Tribal court wardship is currently in force, the state
564 court must accord full faith and credit to any Tribal court orders, records,
565 and judicial proceedings.
566

567 Practice Guidelines

- 568 A. The state court must transfer, unless the Tribal court declines jurisdiction, either
569 parent objects to such transfer, or if the court determines that good cause exists
570 to deny the transfer.
571
572 B. If the parent or Native American custodian requests, either orally or in writing,
573 workers should recommend such a transfer. If not, the grounds on which the
574 worker would oppose a transfer petition must be documented.
575
576 C. If the Tribe requests, either orally or in writing, workers should recommend such
577 a transfer. If not, the grounds on which the worker would oppose a transfer
578 petition must be documented.
579
580 D. If any party believes that good cause exists not to transfer the proceeding, they
581 must document in writing their reasons for such belief in the case record and
582 court file.
583
584 E. Written statements must be distributed to all parties so that everybody has the
585 opportunity to provide the court with their views.
586

705.10 Active Efforts Required To Prevent Family Breakup

Major objectives:

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

Applicable Law

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

Practice Guidelines

- A. The Child and Family Services caseworker will offer the provisions of services of a remedial nature designed to rehabilitate and prevent the breakup of Native American families to the same extent that are available to non-Native American families when eligible.
- B. Prior to initiating a petition before a state court for foster care placement or termination of parental rights, the Child and Family Services caseworker will undertake active efforts to provide remedial services and rehabilitative programs to the family designed to prevent its breakup.
- C. In determining the type of remedial services that are appropriate, consider the following:
 - 1. Are the Native American child's or Native American parent's cultural values, beliefs, and religious practices tied to the child's Tribe?
 - 2. Does the Native American child or parent or Native American custodian maintain cultural ties to a Tribe?
 - 3. Is the Native American child or parent or Native American custodian willing to accept services provided by the Tribe or an organization such as an AI/AN cultural and/or service center?
 - 4. Is there an organization such as an AI/AN cultural and/or service center that can offer culturally appropriate services to Native American children and their families in close proximity to the Native American child, parent, or Native American custodian? Are these services designed to prevent removal or reunify Native American families?
 - 5. Is the Native American child's Tribe able and willing to provide services that eliminate the risk factors that prevent the child from living safely at home?

- 629 6. Is there a contract provider who has access to culturally American Indian
630 programs and/or resources?
631
- 632 D. To reduce the potential for cultural bias when evaluating home and family
633 conditions and making decisions affecting Native American children and families,
634 the Child and Family Services caseworker should involve the Tribe and Native
635 American organizations at the earliest possible point of intervention.
636
- 637 E. Services in the community specifically designed for Native American families are
638 to be used where available, including resources of the extended family, the Tribe,
639 urban Native American organizations, Tribal family service programs and
640 individual Native American caregivers, e.g., medicine men or women, and other
641 individual Tribal members who may have developed special skills that can be
642 used to help the child's family succeed.
643
- 644 F. In order to demonstrate that "active efforts" have been made, the Child and
645 Family Services caseworker must assure that due consideration has been given
646 to the cultural needs and values of the family and that resources have been
647 diligently sought to provide family services.
648

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.

- 662
- 663 A. Do caseworkers consider cultural conditions and way of life of the child's Tribe
664 and/or Native American community in making judgments about the family?
665
- 666 B. Do caseworkers intervene only when supported by relevant, prevailing Native
667 American social and cultural standards regarding intervention in familial
668 relationships by non-family?
669
- 670 C. Do caseworkers develop a case plan with assistance of parent/custodian that
671 involves use of Tribal Native American community resources?

- 672
673 D. Do caseworkers encourage maintenance of the child in his or her family except
674 where physical or emotional harm may result?
675
676 E. Do caseworkers involve the child, if of sufficient age, in the design and
677 implementation of case plan?
678
679 F. Do caseworkers provide time and resources to prevent family breakup in at least
680 equal measure to time and resources provided to other families?
681
682 G. Do caseworkers assist parents or custodian and child to maintain an ongoing
683 familial relationship?
684

705.12 Termination Of Parental Rights

Major objectives:

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

Applicable Law

25 U.S.C. §1912(f)

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

Practice Guidelines

- 694
695
696
697
698
699
700 A. Only where the standard can be satisfied that serious emotional or physical
701 damage is likely to result to the child would termination of parental rights be
702 appropriate and adoption a potentially appropriate plan for the Native American
703 child.
704
705 B. The testimony of qualified expert witnesses is required by the ICWA.
706
707 C. When the ICWA termination standard cannot be met, the permanency plan will
708 need to provide for a different option (e.g., a long-term guardianship, a relative
709 placement, or continued efforts at reunification).
710
711 D. Where a parent is making progress toward reunification by the time of the 12-
712 month hearing, it may be appropriate to continue reunification as the permanency
713 goal.
714

- 715 E. Any permanency plan developed for a Native American child that provides for
716 out-of-home placement, including an adoptive placement, must comply with the
717 placement preferences outlined in 25 U.S.C. §1915.
718 1. The child must be placed in a manner consistent with the foster/pre-
719 adoptive placement preferences established by ICWA, which are:
720 a. Member of the child's extended family;
721 b. Foster home licensed, approved, or specified by the Native
722 American child's Tribe;
723 c. Native American foster home licensed or approved by an
724 authorized non- Native American; or
725 d. An institution for children approved by a Native American Tribe or
726 operated by a Native American organization that has a program
727 suitable to meet the child needs.
728 2. In any adoptive placement, preference will be given, in absence of good
729 cause to the contrary, to a placement with:
730 a. A member of the child's extended family;
731 b. Other members of the Native American child's Tribe; or
732 c. Other Native American families.
733

705.13 Qualified Native American Expert Witness

734
735 Major objectives:

736 The Child and Family Services caseworker will enlist a qualified Native American expert
737 witness who is experienced and knowledgeable about Indian culture, childrearing
738 practices, and traditions to render an opinion as to whether a Native American child is
739 suffering from some form of physical or emotional harm because of the behavior of the
740 family.
741

742
743 **Applicable Law**

744 25 U.S.C. §1912(e) and (f)

745 The testimony of qualified Native American expert witnesses is required by ICWA
746 before a foster care placement or a termination of parental rights may be ordered.
747

748 Practice Guidelines

- 749 A. Child and Family Services caseworkers will:
750 1. Enlist the state ICWA specialist to serve as an expert witness or contact to
751 help locate a qualified expert witness.
752 2. Enlist the assistance of the Native American child's Tribe in locating
753 persons qualified to serve as expert witnesses.
754 3. Enlist the assistance of the closest Bureau of Indian Affairs area office in
755 locating persons qualified to serve as expert witnesses.

- 756 4. Contact official reservation Tribal organizations or urban Native American
757 programs that serve children and families to locate potential expert
758 witnesses.
759
- 760 B. "Qualified expert witnesses" who are routinely relied on in ICWA hearings
761 include:
762 1. A member of the Native American child's Tribe who is recognized by the
763 Tribal community as knowledgeable in Tribal customs as they pertain to
764 family organization and child-rearing practices.
765 a. Medicine men;
766 b. Medicine women;
767 c. Tribal leaders;
768 d. Tribal ICWA specialist.
769 2. A lay person having substantial education and experience in the area of
770 his or her specialty along with substantial knowledge of prevailing social
771 and cultural standards and childrearing practices within the Native
772 American child's Tribe.
773 a. Native American child welfare workers;
774 b. Day care workers;
775 c. Bureau of Indian Affairs resource: knowledge of customs and
776 culture of Tribes they serve;
777 d. Tribal ICWA specialist;
778 e. State ICWA specialist.
779 3. A professional person having substantial education and experience in the
780 area of his or her specialty along with substantial knowledge of prevailing
781 social and cultural standards and childbearing practices within the
782 community.
783 a. Psychologists;
784 b. Psychiatrists;
785 c. Social workers;
786 d. State ICWA specialist.
787

788 705.14 Recognition Of Tribal Licensing And/Or Approval Of 789 Standards For Foster Homes

790 Major objectives:

791 Child and Family Services will recognize full faith and credit of an Indian Tribe's
792 licensure of a Tribal foster home located on state lands and within Indian country. [within
793 and outside Native American country that are certified, approved, or licensed as meeting
794 the foster home licensing requirements under state law.]
795

796 Applicable Law

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

798
799 25 U.S.C. §1901-1963
800 The ICWA provides that Tribes may develop and implement Tribal foster home
801 standards. The office will **continue to** license Tribal foster homes according to
802 standards developed and approved by the Tribe **or the Tribe may develop their own**
803 **Tribal licensing standards**.

804
805 Practice Guidelines

806 A. If the Tribe has not developed **their own licensing** standards, the office will
807 license Tribal foster homes pursuant to this chapter.

808
809 B. **Utah Foster Care currently recruits and trains Native American foster families**
810 **and coordinates with Utah Tribes to increase recruitment efforts.**~~[Many regional~~
811 ~~offices will want to make greater efforts and work more cooperatively with Tribes~~
812 ~~to recruit Native American foster care and adoptive homes, and to encourage~~
813 ~~Tribes to develop programs to recruit and license Native American foster care~~
814 ~~and adoptive homes.]~~

815
816 **705.15 Higher Standards Of Proof**

817
818 Major objectives:

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

821
822 **Applicable Law**

823 25 U.S.C. §1901-1963

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

827
828 Practice Guidelines

829 Through ICWA, Congress declared that a Native American child may not be removed
830 simply because there is someone else willing to raise the child who is likely to do a
831 better job or because it would be "in the best interests of the child" for him or her to live
832 with someone else. Nor can a placement or termination of parental rights be ordered
833 simply based on a determination that the parents or custodians are "unfit parents." It
834 must be that it is dangerous for the child to remain in his or her present conditions.
835

836 **705.16 Out-Of-Home Placement Of Native American Children**

837 Major objectives:

838 Child and Family Services caseworkers will give preference to the foster and pre-
839 adoptive placements, unless the Native American child's Tribe has established a
840 different order of placement. The caseworker should also contact the Tribe to discuss
841 Tribal placement preferences as early as possible in case development.
842

843

844 **Applicable Law**

845 25 U.S.C. §1915(d)

846 The preferences and standards recognized are the prevailing social and cultural
847 standards of the Native American community in which the parent or extended family
848 resides or with which the parent or extended family maintains social and cultural ties.
849

850 NOTE: The significance of Native American community standards cannot be
851 overemphasized. In enacting this provision Congress realized that even where a Native
852 American child's bond to the parents or custodian is severed, state courts must make
853 every effort to recognize and preserve the tie between the Native American child and
854 the child's Tribe in order to protect the future and sustainability of the Tribe itself.
855

856 Practice Guidelines - Documentation

857 Documentation in the case file should relate indications of the likelihood of serious
858 emotional or physical damage to particular conditions in the home, showing a causal
859 relationship between the conditions and the serious damage that is likely to result to the
860 child.
861

- 862 A. For example, it is not adequate to show that the parent abuses alcohol. It is
863 necessary to show, because of alcohol abuse, the parent may cause emotional
864 or physical damage to the child.
865
- 866 B. In cases of placement, document the active efforts that were unsuccessful.
867
- 868 C. The case record must document that before initiating court proceedings to
869 remove a child, that:
- 870 a. The conduct or condition of the parent will result in serious physical or
871 emotional harm to the child.
 - 872 b. Efforts were made to counsel and change the parents' behavior, but they
873 did not work.
874

875 Practice Guidelines - Foster Care/Kinship And Adoptive Placements

876 A. ICWA requires:

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

-
- 879 2. The child must be placed in reasonable proximity to the child's permanent
880 home, 25 U.S.C. §1915(b).
- 881 3. Inquiry must be made of the child's Tribe regarding the Tribe's customary
882 definition of extended family, 25 U.S.C. §1903(2).
883
- 884 B. The child must be placed within the foster/pre-adoptive placement preferences
885 established by ICWA, which are:
- 886 1. Member of the child's extended family.
887 2. Foster home licensed, approved, or specified by the Native American
888 child's Tribe.
889 3. Native American foster home licensed or approved by an authorized non-
890 Native American.
891 4. An institution for children approved by a Native American Tribe or
892 operated by a Native American organization that has a program suitable to
893 meet the child's needs.
894
- 895 C. In any adoptive placement, preference will be given, in absence of good cause to
896 the contrary, to a placement with:
- 897 1. A member of the child's extended family.
898 2. Other members of the Native American child's Tribe.
899 3. Other Native American families.
900
- 901 D. The Child and Family Services caseworker should:
- 902 1. Contact the Tribe to ask if they have a different placement preference than
903 those set forth in ICWA.
904 2. Ask the Tribal social worker about concurrent planning options early in the
905 case.
906 3. File appropriate documents to show that a diligent search was undertaken
907 to follow ICWA's placement preference.
908 4. Contact the Tribe's social service office for input.
909 5. Establish contact with the child's extended family.
910 6. Conduct a search of state and county lists of available Native American
911 homes.
912 7. Contact other Tribes and Native American organizations with available
913 placement resources.
914
- 915 E. Documentation that must be in the record.
- 916 1. If the placement is outside the preferences established by ICWA, the
917 record must document the reason.
918 2. If any party believes that good cause exists to place the child outside the
919 placement preferences, the reasons for that belief must be documented in
920 the record

921 3 If there is a finding(s) in a court order of good cause to place a child
922 outside the placement preferences of ICWA, the reasons must be
923 documented in the record
924

925 Practice Guidelines - Voluntary Placements And Adoptions

- 926 A. ICWA applies to voluntary placements involving public and private agencies. For
927 valid consent to be given, the following conditions must be met:
- 928 1. The child is over 10 days old.
 - 929 2. The consent is in writing and recorded before a judge.
 - 930 3. The consent is accompanied by the judge's certification that the terms and
931 consequences of the consent were fully explained in detail and fully
932 understood by the Native American parents or Native American custodian.
933
- 934 B. §1913(b) of the ICWA grants a parent or Native American custodian the right to
935 withdraw consent to the termination of parental rights prior to the entry of the final
936 order of termination.
937
- 938 C. Consent should be obtained from both parents. If not, the non-consenting
939 parent's rights must be terminated involuntarily in accordance with ICWA.
940
- 941 D. If the case involved an unwed father and the father sought to acknowledge or
942 establish paternity, the state should acknowledge that paternity.
943
- 944 E. The consent signed by the Native American parents or custodians should
945 contain:
- 946 1. Name and birth date of child.
 - 947 2. Name of child's Tribe.
 - 948 3. Child's enrollment number or other indication of membership in the Tribe.
 - 949 4. Name and address of consenting parents or Native American custodian.
 - 950 5. Name and address of prospective parents, if known, for substitute care
951 placements.
 - 952 6. Name and address of person or agency through which placement was
953 arranged, if any, for adoptive placements.
 - 954 7. Parents' right to withdraw consent from termination and regain custody of
955 child before entry of official order.
 - 956 8. Parents'/Native American custodian's right to be notified if the adoption is
957 set aside or vacated or otherwise unsuccessful and the right to petition
958 court for custody.
 - 959 9. A statement of the parents' right for parental consent to be signed in
960 closed court.
961

705.17 Change Of Placements

Major objectives:

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

Applicable Law

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

Practice Guidelines

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

705.18 Records Of Placement

Major objectives:

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

Applicable Law

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

Practice Guidelines

- A. Written record of placement. This record will be maintained in SAFE, separate from the court report, and will contain, at a minimum, the petition or complaint, all substantive orders entered during the proceeding, and the complete record of the placement determination.
- B. Where the placement does not meet the preference priorities, the efforts to find suitable placement within those priorities will be recorded and documented in detail. Documentation will also be provided showing that the placement chosen is in the least restrictive setting possible, meets the child's special needs, and as much as possible, in cases of foster care placement, is close to the child's own home.
- C. At any time, upon the request of the Native American child's Tribe or the Department of the Interior, Child and Family Services will make available records

1004 of every foster care, pre-adoptive, and adoptive placement of each Native
1005 American child maintained by Child and Family Services.
1006

1007 **705.19 Involuntary Adoptive Placements**

1008 Major objectives:

1009 Child and Family Services will observe the adoption preferences as indicated in ICWA.
1010

1011 **Applicable Law**

1012 25 U.S.C. §1915(a)

1013 §1915(a) of the ICWA outlines the adoptive placement preferences:

- 1014 1. A member of the child's extended family.
- 1015 2. Other members of the Native American child's Tribe.
- 1016 3. Other Native American families.

1017 Practice Guidelines

- 1018 A. The Tribe has the authority under §1915(c) to establish, by resolution, a different
1019 order of preference.
- 1020 B. The county/state or court effectuating the placement must follow the Tribe's
1021 alternate preference order as long as it is the least restrictive setting appropriate
1022 to the particular needs of the child.
- 1023 C. Where appropriate, the Native American child's preference or parents'
1024 preferences will be considered.
- 1025 D. Where a consenting parent requests anonymity, the court or state agency will
1026 give weight to the parent's request in applying the preferences.
- 1027 E. The Child and Family Services caseworker should contact the Tribe very early to
1028 ask if they have a different placement preference than those set forth in the
1029 ICWA.
- 1030 F. Documentation that must be in the record:
 - 1031 1. If any party believes that good cause exists to place the child outside the
1032 placement preferences, the reasons for that belief must be documented in
1033 the record.
 - 1034 2. If there is a finding(s) in a court order of good cause to place a child
1035 outside the placement preferences of ICWA, the reasons must be
1036 documented in the record.

705.20 Disrupted Adoptive Placements

Major objectives:

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

Applicable Law

25 U.S.C. §1912

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

Practice Guidelines

Documentation:

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

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.

- 1088
1089 B. **Child and Family Services will make available all relevant records to the Indian**
1090 **child's Tribe or Secretary of the Interior.[Upon request, the placement records will**
1091 **be made available to the Native American child's Tribe or the Secretary of the**
1092 **Interior.]**
1093
1094 C. Confidentiality and protection of children and adults should be considered and
1095 addressed when providing documents.
1096

1097 **705.22 Full Faith And Credit For Public Acts, Records, And** 1098 **Judicial Proceedings Of Tribes**

1099 Major objectives:

1100 Child and Family Services will recognize its responsibility to give full faith and credit to
1101 the public acts, records, and judicial proceedings of any Native American Tribe with
1102 regard to Native American custody proceedings.
1103

1104 **Applicable Law**

1105 25 U.S.C. §1911(D)

1106 The United States, every state, every territory or possession of the United States, and
1107 every Native American Tribe will give full faith and credit to the public acts, records, and
1108 judicial proceedings of any Native American Tribe applicable to Native American child
1109 custody proceedings to the same extent that such entities give full faith and credit to the
1110 public acts, records, and judicial proceedings of any other entity.
1111

1112 **705.23 ICWA Training**

1113 Major objectives:

1114 Regions, contractors, and individual workers will receive on a regular and ongoing basis
1115 training regarding the intent and application of the ICWA. Child and Family Services will
1116 encourage other regular participants in the system to obtain or to participate in such
1117 training.
1118
1119

1120 **Applicable Law**

1121 Utah Code Ann. [§62A-4a-105](#). Division responsibilities.
1122

1123 Practice Guidelines

- 1124 A. The state ICWA specialist will set forth a format for training to improve the
1125 understanding of ICWA, which will provide a solid working knowledge of ICWA.
1126
1127 B. The state ICWA specialist will coordinate with the state training coordinator to
1128 integrate/ICWA into existing and ongoing training for state employees.
1129
1130

- 1131 C. The state ICWA specialist will coordinate joint training and dialogue with state
1132 and Tribal child welfare agencies and court personnel to strengthen existing
1133 working relationships.
1134