

INDIAN CHILD WELFARE ACT AND 2016 FEDERAL REGULATIONS

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Overview of Discussion

- Indian Child Welfare Act history
- 2016 Federal Regulations



ICWA History



History



ICWA Purpose

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

25 USC § 1902 (2006)



Safeguards for Indian Children

- Protective dual jurisdictional scheme
- Mandates to ID Indian children as soon as possible in the case
- Higher service provision standards (active vs reasonable efforts) to avoid the breakup of the family
- Standards of evidence higher
- Placement preferences clearly defined
- Right to Intervene and Right to Transfer
- QEW testimony



Why the Need for Regulations?

- Native kids still disproportionately more likely to be removed from their homes
- Inconsistent implementation and interpretation of law across country and even within states
- 2015 and 2016 Guidelines non-binding

[The Heart of ICWA: Becky](#)



Regulations

- Citation: 25 C.F.R. 23
- Final Rule promulgated June 14, 2016
- Took effect December 12, 2016
- Available at <https://www.gpo.gov/fdsys/pkg/FR-2016-06-14/pdf/2016-13686.pdf>

State laws that provide higher protections of the parents control over the regulations. 23.106



Applicability: types of proceedings

- Definition of Child Custody Proceedings 23.103
 - Applies to:
 - Foster care placements
 - Guardianships
 - TPR
 - Pre-adopt placements
 - Adoptive placements
 - Voluntary and involuntary placements where parents can't get children returned on demand
 - Custody disputes in which neither parent will get custody
 - Status offenses
 - “Custody” and “Continued Custody” 23.103
 - Domicile: domicile follows the parent or custodian. Court determines domicile 23.110(a)



Applicability: is this an Indian child?

- At the earliest stages of contact between Dept and a family, was there an inquiry of each party re whether they know or have reason to know the child is or could be Indian.
- At every hearing, every stage of any case, the court must repeat this inquiry of every participant on the record.
- What's a "reason to know"?
 - Anyone tells the court the child is an Indian child or there is info indicating the child is Indian
 - Domicile of the child or parent/Indian custodian is on a reservation
 - Child is or has been a ward of a Tribal court



• Parent or child has ID indicating Tribal membership

Applicability: is this an Indian child?

- The court must instruct the parties to inform the court if they subsequently receive information that reason to know the child is an Indian child. 23.107(a)
- Unless and until determined not to be Indian child, treat as though is. 23.107(b)(2)
- Only Tribe can determine if a child is Indian child. 23.108



Notice 23.111

- In any ***involuntary proceeding*** in a State court where the court knows or ***has reason to know*** that an Indian child is involved, and where the identity and location of the child's parent or Indian custodian or Tribe is known, ***the party seeking the foster-care placement*** of, or termination of parental rights to, an Indian child ***must directly notify the parents, the Indian custodians, and the child's Tribe by registered or certified mail with return receipt requested***, of the pending child-custody proceedings and their right of intervention.



Notice (cont'd)

- For child-custody proceedings in Washington, notices must be sent to:

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

**Failure to provide proper notice is grounds to
invalidate the court's action.**

25 USC 1914



Tribe's Right to Intervene

The child's Tribe has an
absolute right to intervene in the case



Transfer to Tribal Court 23.115-119

- Request for Transfer must be made orally on the record in court, or in writing by the parent, custodian, or the child's Tribe
- Right to transfer is available ***at any stage of the proceedings*** 23.115(b)
- Courts must transfer unless parent objects, tribal court declines transfer, or good cause exists not to. 23.117.
- Courts ***cannot consider*** whether the proceedings are at an advanced stage when the petitioned didn't get notice until advanced stage; whether transfer was requested previously; whether transfer could impact child's placement; child's cultural connections to Tribe; socioeconomic conditions or perceptions of the tribal/BIA social services/judicial body. 23.118



Initial Inquiry – Active Efforts

- *Active efforts* means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. 23.2
- Definition emphasizes using culturally appropriate services and working with the child's Tribe to provide services
- Prior to ordering involuntary FC placement or TPR, court must conclude that active efforts have been made to prevent the breakup of the family and that they have been unsuccessful. 23.120(a)
- Active efforts must be documented in court record before requesting foster care or TPR 23.120(b)



Standards of Evidence

- To place Indian child in FC, C&C evidence must be presented, supported by QEW that continued custody likely to result in serious emotional or physical damage to child. 23.121(a)
- TPR requires evidence beyond a reasonable doubt + QEW that continued custody likely to result in serious emotional or physical damage to child. 23.121(b)
- Evidence must show causal relationship between the particular conditions in the home and the likelihood that continued custody will result in serious emotional or physical damage to the child. 23.121(c)



Qualified Expert Witnesses 23.122

- QEW must be able to testify that parent's continued custody of child is likely to result in serious emotional or physical damage to child
- QEW must be able to testify re prevailing cultural and social standards ***of the child's Indian tribe***
- Tribes may designate QEW
- Assigned agency social worker ***may not serve as QEW.***
23.122(c)



Emergency Proceedings 23.113

- *Emergency proceeding* means and includes any court action that involves an emergency removal or emergency placement of an Indian child.
- Are only authorized to protect child in ***imminent physical damage or harm***, but should cease immediately when the placement is no longer necessary to prevent harm.
23.113(b)(1)
- Can be terminated by initiation of child custody proceeding subject to ICWA; transfer of case to Tribe; or Return home
- Emergency removals should not last longer than 30 days unless court has made findings pursuant to 23.113(10)(e)



What if a party alleges improper removal?

- If a party asserts that a child was improperly removed from a parent or Indian custodian's care, the court must expeditiously determine whether removal was improper
- If court determines that there was an improper removal, the court must terminate the proceeding and return the child to the parent or Indian custodian, unless doing so would subject the child to substantial and immediate danger.

23.114



Voluntary Proceedings 23.124-128

- “Voluntary” means either parent, both parents, or the Indian custodian has consented to the placement or the TPR
 - Of their free will
 - Without threat of removal by state
- Parent must be able to have child returned to them “Upon demand”, without any contingencies.



Voluntary Proceedings 23.124-128

- Inquiry + Verify: is this an “Indian child”
- Placement preferences in 23.129-132 must be complied with
- Parental Consent Requirements:
 - In writing and recorded by court with jurisdiction
 - Not valid if prior to or within 10 days after birth of child
 - Court must explain terms and consequences of consent and certify the parent understood
- Parent / Indian custodian may withdraw consent to:
 - Voluntary FC at any time
 - Voluntary TPR at any time prior to entry of final TPR decree
 - Voluntary adoption any time prior to entry of final adoption decree



Placement Preferences in FC or pre-adopt placements 23.131

- Statutory preferences apply in any foster care, pre-adoptive, and adoptive placement of Indian child, ***unless good cause*** exists ***or*** child's Tribe has a different placement preference order 23.131(c)



Placement Preferences in FC or pre-adopt placements 23.131

Indian child must be placed in least-restrictive setting that:

- 1) Most approximates a family, taking into consideration sibling attachment;
- 2) Allows special needs to be met; AND
- 3) Is in reasonable proximity to child's home, extended family, or siblings.

If the child's Tribe does not have different order of preference, preference must be given in descending order:

- 1) Member of child's extended family;
- 2) Foster home that is licensed, approved or specified by Tribe;
- 3) Indian foster home licensed/approved by non-Indian authority;
- 4) Institution for children approved by Tribe



Good Cause to Deviate from Placement Preferences

- What is good cause? 23.132
- Party seeking deviation must state on the record in court or in writing the reason for that request. Bears burden to show by C&C evidence that good cause exists. 23.132(b)
- Court's determination of good cause must be made on record or in writing 23.132(c)
 - Indian Foster Home – at least one foster parent must be an Indian person as defined under ICWA



Invalidating actions for ICWA violations

23.137

- An Indian child, parent, Indian custodian, and the child's Tribe can all petition to invalidate an action for foster care placement or TPR under state law where it is alleged that ICWA 1911, 1912, or 1913 have been violated. Petitioner does not have to show that their rights were violated – only that there were violations of the law
- Upon that petition, court must determine whether appropriate to invalidate action



To Learn More

- **National Indian Child Welfare Association:** nicwa.org
- **BIA ICWA page:** bia.gov
- **Heart of ICWA YouTube channel**
- **Turtle Talk:** turtletalk.wordpress.com
- **Capacity Building Collaborative and Center for States:** capacity.childwelfare.gov

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