

A TECHNICAL SUPPORT BULLETIN FOR JUDICIAL OFFICERS  
**INDIAN CHILD WELFARE ACT**  
PUBLIC LAW 95-608, 92 STAT. 3069, 25 USC 1901 *ET. SEQ.*  
Juvenile Court Improvement Project • Oregon Judicial Department



## POLICY & PROCEEDINGS COVERED

### POLICY

25 USCS § 1902

- stability and security of Indian tribes and families
- best interest of Indian children is to maintain ties with her/his Indian tribe, culture, and family.

ORS 419B.090(5)

- Oregon recognizes the value & incorporates the policies of ICWA

### PROCEEDINGS COVERED

25 USCS § 1903(1)

**ICWA covers placements made during the following types of child custody proceedings:**

- foster care (dependency proceedings)
- termination of parental rights
- pre-adoptive
- adoptive
- status offense (which can only be committed by children)

**ICWA does not cover:**

- delinquency
- divorce or custody proceedings



## PRE-TRIAL REQUIREMENTS

### INDIAN CHILD DETERMINATION

25 USCS § 1903(4)

ORS 419A.004(14)

**"Indian child"** means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.

ORS 419B.878

Pending determination of Indian child status, if the court has reason to know that an Indian child is involved, the court shall enter an order that the case be treated as an ICWA case until such time as the court determines that the case is not an ICWA case.

### EMERGENCY REMOVALS

25 USCS § 1922

OAR 413.070.0150

An Indian child may be removed and placed in emergency protective custody in order to prevent imminent physical damage or harm.

- The Warm Springs and Burns Paiute tribes have exclusive jurisdiction over child custody matters. An Indian child **located on** one of these reservations may not be removed.

## TRIBE DETERMINATION

- 25 USCS § 1903(5) "Indian child's tribe" means:
- (a) the Indian tribe in which an Indian child is a member or eligible for membership or
  - (b) if there is more than one tribe, the Indian tribe with which the Indian child has the more significant contacts
    - court makes tribal determination based on documentation of investigation conducted by worker.
- OAR  
413.070.0170(7)

## NOTICE REQUIREMENTS

- 25 USCS § 1912 Agency notification (registered mail return receipt requested) of parent/Indian custodian and the Indian child's tribe of the pending proceedings and of their right to intervene.

No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe.

The parent or Indian custodian or the tribe shall, upon request, be granted up to 20 additional days to prepare for proceeding.

## JURISDICTION DETERMINATION

- 25 USCS § 1911(a) Tribe has exclusive jurisdiction if:
- (a) the Indian child is a member or eligible for membership and resides or is domiciled within the reservation of the Warm Springs or Burns Paiute tribes, or
  - (b) the Indian child is a ward of a tribal court, regardless of the residence or domicile of the child.
- OAR 413.070.0140

If a tribe has exclusive jurisdiction and this is not an emergency removal, the petition shall be dismissed.

## IMPROPER REMOVALS

- 25 USCS § 1920 If an Indian child is improperly removed from the parent or Indian custodian the court shall decline jurisdiction and return the child to his parent or Indian custodian unless returning the child would subject the child to a substantial and immediate danger or threat of such danger.



## TRANSFERS TO TRIBAL COURTS

- 25 USCS § 1911(b) If the child is not domiciled or residing on an Indian reservation, either parent, the Indian custodian, or the Indian child's tribe may request that the court transfer the proceeding to the tribal court of the child's tribe.

The court must transfer unless:

- (a) either parent objects to the transfer,
- (b) the tribal court declines jurisdiction, or
- (c) the court determines that good cause to the contrary exists

BIA Guidelines for State Courts; Indian Child Custody Proceedings (C2/C3)

Good cause may exist if any of the following exists:

- the proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.
- the Indian child is over twelve years and objects to the transfer.
- the evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.
- the parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.

BIA Guidelines for State Courts; Indian Child Custody Proceedings (C2/C3)

Notify the tribal court in writing of the proposed transfer. The tribal court shall have at least twenty days from the receipt of notice of a proposed transfer to decide to accept or decline the transfer.



## ADJUDICATION REQUIREMENTS

### ACTIVE EFFORTS

25 USCS § 1912(d)  
OAR  
413.070.0160(4)

Worker must demonstrate that active efforts were made to alleviate the need for removal

- See OAR for guidelines for demonstrating active efforts.

### STANDARDS OF EVIDENCE

25 USCS § 1912

Foster Care Placement – clear and convincing evidence;  
TPR – beyond a reasonable doubt

- That continued custody by the parent/Indian custodian is likely to result in serious emotional or physical damage to the child

### QUALIFIED EXPERT WITNESSES

25 USCS § 1912

Testimony required that continued custody by the parent/Indian custodian is likely to result in serious emotional or physical damage to the child.

BIA Guidelines for State Courts; Indian Child Custody Proceedings (D4)

Likely characteristics:

- Member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs, family organization, and childrearing practices.
- Witness with substantial experience in child and family services for Indians, and extensive knowledge of social and cultural standards and childrearing practices within the Indian child's tribe.
- Professional person with substantial education and experience in the area of his or her specialty.



## DISPOSITION REQUIREMENTS

### PLACEMENT PREFERENCES

25 USCS § 1915

Adoptive placement preferences (absent good cause to the contrary):

- Indian child's extended family
- Other members of the Indian child's tribe; or
- Other Indian families, including families of single parents.
- The Indian child's tribe may establish a different order of preference that must be followed if placement is the least restrictive setting appropriate to the child's needs.

25 USCS § 1915

Foster Care or Preadoptive Placements must be the least restrictive setting which:

- (i) most approximates a family;
- (ii) in which the child's special needs may be met; and
- (iii) which is in reasonable proximity to his or her home

Placement preferences (absent good cause to the contrary):

- Indian child's extended family;
- Foster home (licensed, approved or specified by the tribe)
- Indian foster home licensed/approved by DHS
- Institution approved by the tribe or operated by an Indian organization which has a program suitable to meet the child's needs.
- The Indian child's tribe may establish a different order of preference that must be followed if placement is the least restrictive setting appropriate to the child's needs.

### GOOD CAUSE TO MODIFY PREFERENCES

BIA Guidelines for  
State Courts;  
Indian Child  
Custody  
Proceedings (F3)

Based on:

- Request of the biological parents or a mature child.
- The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness.
- The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.
  - ❖ diligent search *at a minimum* means contact with the child's tribal social service program, a search of all county or state listings of available Indian homes and contact with nationally known Indian programs with available placement resources
- The burden of establishing the existence of good cause is on the party urging that the preferences not be followed.



## POST-TRIAL RIGHTS

### NOTICE OF CHANGE IN CHILD'S STATUS

25 USCS § 1916

Notice of right to petition for return of the child shall be given to the child's biological parents or prior Indian custodians if:

- Final decree of adoption is vacated or set aside,
- Adoptive parent(s) voluntarily relinquishes child, or
- Child is removed from a foster care home or institution for the purpose of further foster care, preadoptive placement, or adoptive placement.



## VOLUNTARY PROCEEDINGS

25 USCS § 1913

Voluntary foster care placements and voluntary terminations or adoptive placements must be executed in writing and recorded before a judge

- court certifies that the terms and consequences of the consent were explained in detail and in the language of the parent or Indian custodian and were fully understood by the parent or Indian custodian.

Consent can be withdrawn & child returned to the parent/Indian custodian:

- voluntary foster care placement – at any time
- voluntary terminations or adoptive placements – any time prior to entry of a final decree

### References:

- 25 U.S.C. 21 Sections 1901-1963
- 67584 Federal Register vol. 44, No. 228: Bureau of Indian Affairs Guidelines for State Courts; Indian Child Custody Proceedings. November 26, 1979
- Oregon Administrative Rules 413.070.0100 / 0260: Placement of Indian Children
- ORS 419

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