

BIA ICWA Rule: 25 CFR 23

Final Rule – 81 FR 38778 (June 14, 2016)



U.S. Department of the Interior
Office of the Assistant Secretary – Indian Affairs

Acronyms

- Acronyms used in this training:
 - ICWA: Indian Child Welfare Act
 - TPR: Termination of parental rights
 - BIA: Bureau of Indian Affairs
 - CFR: Code of Federal Regulations
 - U.S.C.: United States Code

Contents

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- New BIA Rule
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Background & Overview

Background

- Congress passed the [Indian Child Welfare Act \(ICWA\)](#)* in 1978
 - Congress concluded, based on its extensive fact-finding that --
 - State and private agencies were:
 - Removing Indian children from their homes and communities at a higher rate than non-Indian children
 - Placing them in non-Indian homes
 - Cultural biases & ignorance of Native cultural and social standards were a cause
 - Negative effects on children, families, Tribes
 - Established [minimum Federal standards](#) (procedural and substantive) for State child custody proceedings involving an “Indian child”

* 25 U.S.C. § 1901 *et seq.*

Background (cont'd)

- Why did BIA pursue this rule? Why now?
 - In 30+ years since ICWA enacted:
 - Indian children are **still** removed from their homes and communities at a disproportionately higher rate than other children
 - Implementation of ICWA by States has been inconsistent
 - Different interpretations from State to State
 - Different interpretations even from court to court within States
 - During consultations on the 2015 update to the Guidelines, many commented on the need for binding regulations

Overview of the New Rule

- The rule implements the substantive & procedural standards of ICWA (the Act) to:
 - Provide a uniform Federal standard
 - Promote nationwide consistency
 - Provide clarity that will reduce litigation and produce better outcomes for children
- Final rule in Federal Register at 81 FR 38778 (June 14, 2016)
- Will be codified at 25 CFR 23
 - Updates current § 23.11 and adds §§ 23.101 – 23.144

Highlights of the New Rule

- This training will review the following highlights of the rule:
 - Determining Whether ICWA Applies
 - Types of Proceedings
 - “Indian child”
 - Notice
 - Jurisdiction & Handling Requests to Transfer Jurisdiction
 - Adjudication of Involuntary Proceedings
 - Emergency Proceedings
 - Voluntary Proceedings
 - Placement Preferences
 - Recordkeeping & Ongoing Obligations

Applicability

Applicability

Types of Proceedings

- ICWA and the rule have provisions that apply to:
 - An emergency proceeding
 - A child-custody proceeding
 - Foster-care placement
 - Termination of parental rights (TPR)
 - Preadoptive placement (after TPR)
 - Adoptive placement
 - ICWA and the rule have provisions that apply to:
 - **Involuntary** child custody proceedings and
 - **Voluntary** child custody proceedings (see later slides for how to distinguish whether a proceeding is voluntary)

Applicability “Indian Child”

- ICWA only applies to proceedings involving an “Indian child” based on the statutory definition:
 - A member of a federally recognized Tribe* **or**
 - Eligible for membership with a federally recognized Tribe **and** has biological parent who is a member

*Note: The BIA publishes a list of federally recognized Tribes in the Federal Register each year. The most recent list is available at 81 Fed. Reg. 26826 (May 4, 2016).

Applicability “Indian Child”

- In identifying whether the child is an “Indian child,” court may not look at so-called “Existing Indian Family Exception” factors:
 - Participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities;
 - Relationship between the Indian child and his or her parents;
 - Whether the parent ever had custody of the child, or
 - The Indian child’s blood quantum

Applicability

Identifying Whether ICWA Applies

- Rule **requires court to ask** whether the child is an “Indian child” in each and every child custody proceeding
 - Must ask each participant in the proceeding whether they know or have a reason to know the child is an Indian child
- Lists factors indicating a “**reason to know**”
 - Anyone, including the child, tells the court the child is an Indian child or there is information indicating the child is an Indian child
 - The domicile or residence of the child or parent/Indian custodian is on a reservation or in an Alaska Native village
 - The child is, or has been, a ward of Tribal court
 - Either parent or the child possesses an ID indicating Tribal membership

Applicability

Identifying Whether ICWA Applies (cont'd)

- If there is a “reason to know”, the court must:
 - Confirm, on the record, that the agency or other party used **due diligence** to identify and work with all of the Tribes of which there is reason to know the child may be a member (or eligible for membership), to verify whether:
 - The child is a member **or**
 - A biological parent is a member and the child is eligible for membership
 - Treat the child as an Indian child, unless and until it is determined on the record that the child is not an “Indian child”

Applicability

Identifying Whether ICWA Applies (cont'd)

- Determining if child is an Indian child
 - Verification from Tribe – Tribes have the final say on membership and eligibility for membership
 - State court may rely on Tribal membership card
 - Where the child is a member or eligible for membership, courts must determine **the Indian child's Tribe** for purposes of the Act

Notice

Notice

- Notice to the parent, Indian custodian (if applicable), and Tribe is vitally important to, for example:
 - Provide direction on how to participate in the proceedings
 - Allow Tribes opportunities to provide assistance/resources to the child and family
 - Minimize disruptions and promote stability for the child
- Statute prohibits any foster-care-placement or TPR proceeding from being held until at least **10 days after receipt** of the notice of that particular proceeding (with extensions allowed at option of parent or Tribe)

Notice (continued)

- In involuntary proceedings, requires notice:
 - By *registered or certified mail, return receipt requested*
 - Be filed with the court, with proof of service
 - Copy to BIA Regional Director
- Lists notice contents, requires notice be clear & understandable

Notice (continued)

How to Contact a Tribe

- Contacting Tribes
 - Find the Tribe's designated Tribal agent for service of notice
 - BIA publishes list each year in the Federal Register each year
 - The list is also available at www.bia.gov under the "Office of Indian Services" and "Division of Human Services"

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

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**Indian Child Welfare Act; Designated
Tribal Agents for Service of Notice**

AGENCY: Bureau of Indians Affairs,
Interior.

ACTION: Notice.

SUMMARY: The regulations implementing the Indian Child Welfare Act provide that Indian Tribes may designate an agent other than the Tribal chairman for service of notice of proceedings under the Act. This notice includes the current

Notice (continued)

How to Contact a Tribe

- Contacting Tribes (cont'd)
 - For a Tribe without a designated Tribal agent for service of notice:
 - Contact the Tribe to be directed to the appropriate office or individual
 - Tip: Calling may be the most direct method
 - If you do not have accurate contact information for a Tribe, or the contacted Tribe fails to respond to written inquiries:
 - Seek assistance from the BIA local or regional office or the BIA's Central Office in Washington, DC (see www.bia.gov)

Notice (cont'd)

- Statute and rule require notice in involuntary proceedings only
- However, it's still best practice to provide notice in voluntary proceedings:
 - Court must make a determination of whether the child is an "Indian child"
 - Must take "all reasonable steps" to verify a child's status as an "Indian child" (may include contacting the Tribe)
- The final rule does not preclude State requirements for notice in voluntary proceedings
- The Department recommends that Tribes and other parent be provided notice in voluntary proceedings

Jurisdiction

Jurisdiction

- State courts must determine **jurisdiction**
 - Tribe has exclusive jurisdiction if
 - The Indian child's domicile or residence is on a reservation
 - The child is a ward of Tribal court

Requests to Transfer Jurisdiction

- Procedures for Requests to Transfer Jurisdiction
 - Right of parent / custodian and Tribe to request a transfer to Tribal jurisdiction
 - At any stage and at any time, orally on the record or in writing, in each foster-care or TPR proceeding
- Criteria for Review of a Transfer Petition
 - State court **must** transfer unless:
 - Either parent objects to such transfer;
 - The Tribal court declines the transfer; or
 - Good cause exists for denying the transfer

Requests to Transfer Jurisdiction (cont'd)

- Good Cause to Deny Transfer
 - Reasons must be on the record
 - Court must **not** consider:
 - Whether the proceeding is at an advanced stage, if the Indian child's parent, Indian custodian, or Tribe did not receive notice of the child-custody proceeding until an advanced stage;
 - Whether there have been prior proceedings involving the child for which no petition to transfer was filed;
 - Whether transfer could affect the placement of the child;
 - The Indian child's cultural connections with the Tribe or its reservation; or
 - Socioeconomic conditions or any negative perception of Tribal or BIA social services or judicial systems

Adjudication of Involuntary Proceedings

Adjudication of Involuntary Proceedings

- The court must make certain findings / follow certain procedures before ordering an involuntary foster-care placement or TPR:
 - Active Efforts
 - Standard of Evidence
 - Causal Relationship
 - Qualified Expert Witness

Adjudication of Involuntary Proceedings (cont'd)

- Active Efforts
 - Before ordering an involuntary foster care placement or TPR, the court must conclude that:
 - Active efforts have been made to prevent the breakup of the Indian family and those efforts have been unsuccessful.
 - Active efforts must be documented in detail in the record.
 - Definition of active efforts
 - Affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family
 - See expansive definition at § 23.2.
 - Examples of active efforts

Adjudication of Involuntary Proceedings (cont'd)

- Standards of Evidence
 - Foster-care placement
 - (1) **Clear and convincing evidence,**
 - (2) Including the testimony of qualified expert witness(es),
 - (3) That the child's continued custody by the child's parent or Indian custodian is likely to result in "serious emotional or physical damage" to the child
 - TPR
 - (1) **Evidence beyond a reasonable doubt,**
 - (2) Including the testimony of qualified expert witness(es),
 - (3) That the child's continued custody by the child's parent or Indian custodian is likely to result in "serious emotional or physical damage" to the child

Adjudication of Involuntary Proceedings (cont'd)

- **Causal Relationship**
 - For a foster-care placement or TPR, the evidence must show a causal relationship between:
 - The particular conditions in the home and
 - The likelihood that continued custody of the child will result in serious emotional or physical damage to the particular child who is the subject of the child-custody proceeding
 - Without a causal relationship, evidence that shows only the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself meet the standard of evidence

Adjudication of Involuntary Proceedings (cont'd)

- **Qualified Expert Witness**
 - Must be qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child
 - Should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe
 - A person may be designated by the Tribe as being qualified to testify to the prevailing social and cultural standards
 - Court or any party may request the Tribe or BIA's assistance in locating qualified expert witnesses
 - Must **not** be the social worker regularly assigned to the Indian child

Adjudication of Involuntary Proceedings (cont'd)

- Each party to proceeding involving an Indian child has a right to:
 - Timely examine all reports and other documents filed or lodged with the court upon which any decision may be based
- Court should allow alternative methods of participation in State-court child-custody proceedings involving an Indian child, if it possesses the capability
 - Examples: participation by telephone, videoconferencing

Emergency Proceedings

Emergency Proceedings

- Emergency proceeding
 - Limits on emergency proceedings in recognition of trauma caused by removal and that, once removed, may be harder to return child
 - May be used only when necessary to prevent “imminent physical damage or harm to the child”
 - Must be as short as possible because they do not include the full suite of ICWA protections
 - 30-day limit on emergency removal / placement
 - If new information indicates that the emergency situation has ended, the court must promptly hold a hearing
 - At any court hearing during the emergency, court must determine whether the emergency continues
 - Petition contents

Voluntary Proceedings

Voluntary Proceedings

- Rule clarifies what is “involuntary” vs. “voluntary”
 - **Voluntary** means either parent, both parents, or the Indian custodian has consented to the placement or TPR
 - Of his or her or their free will,
 - Without a threat of removal by a State agency,
- The only voluntary placement excluded from ICWA is where the parent of Indian custodian can regain custody “upon demand”
 - “Upon demand” means simply upon verbal request, without any formalities or contingencies

Voluntary Proceedings

- Requirements in Voluntary Proceedings
 - Inquiry – whether child is an “Indian child”
 - Verification – if reason to believe the child is an Indian child, take all reasonable steps to verify the child’s status with the Tribe
 - Placement preferences
 - State courts must ensure that the placement for the Indian child complies with §§ 23.129 - 23.132

Voluntary Proceedings

- Requirements in Voluntary Proceedings
 - Parental consent requirements
 - In writing and recorded before a court of competent jurisdiction
 - Must include any conditions to the consent
 - Not valid if prior to, or within 10 days after, the birth
 - Court must explain terms & consequences of consent and certify that parent understood
 - Parent or Indian custodian may withdraw consent to:
 - Voluntary foster-care placement at any time
 - Voluntary TPR at any time prior to the entry of a final TPR decree
 - Voluntary adoption at any time prior to the entry of a final decree of adoption

Placement Preferences

Placement Preferences

- Placement preferences apply in any preadoptive, adoptive, or foster-care placement (voluntary or involuntary) of an Indian child
 - If the Indian child's Tribe has established by resolution a different order of preference than that specified in ICWA, the Tribe's placement preferences apply
- Court **must** apply the placement preferences, unless there is a determination on the record that *good cause* exists

Placement Preferences

Placement Preferences – Adoptions

- (1) A member of the Indian child's extended family;
- (2) Other members of the Indian child's Tribe; or
- (3) Other Indian families

Placement Preferences – Foster Care & Preadoptive *

- (1) A member of the Indian child's extended family;
- (2) A foster home that is licensed, approved, or specified by the Indian child's Tribe;
- (3) An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
- (4) An institution for children approved by an Indian Tribe or operated by an Indian organization which has a program suitable to meet the child's needs

*And the child must be placed in the least-restrictive setting that: (1) most approximates a family; (2) allows the Indian child's special needs to be met; and (3) is in reasonable proximity to the Indian child's home, extended family, or siblings

Placement Preferences (cont'd)

- **Placement Preferences – Good Cause to Depart**
 - Party asserting good cause should bear the burden of proving good cause exists by clear and convincing evidence
 - Court's determination should be based on one or more of the following considerations:
 - (1) The request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference;
 - (2) The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made;
 - (3) The presence of a sibling attachment that can be maintained only through a particular placement;
 - (continued...)

Placement Preferences (cont'd)

- Placement Preferences – Good Cause to Depart (cont'd)
 - Court's determination should be based on one or more of the following considerations: (cont'd)
 - (4) The extraordinary physical, mental, or emotional needs of the Indian child
 - E.g., Specialized treatment services that may be unavailable in the community where families who meet the placement preferences live;
 - (5) The unavailability of a suitable preferred placement after court determines a diligent search was conducted, but none has been located.
 - For purposes of this analysis, the standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community

Placement Preferences (cont'd)

- Placement Preferences – Good Cause to Depart (cont'd)
 - Limitations on Court's Determination
 - A placement may not depart from the preferences based on the socioeconomic status of any placement relative to another placement
 - A placement may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA

Recordkeeping & Ongoing Obligations

Recordkeeping & Ongoing Obligations

- States must:
 - Maintain a record of every voluntary or involuntary foster-care, preadoptive, and adoptive placement of an Indian child; and
 - Information that must be included in record:
 - The petition or complaint; all substantive orders entered in the child-custody proceeding; the complete record of the placement determination; and detailed documentation of the efforts to comply with the placement preferences
 - Make the record available within 14 days of a request by an Indian child's Tribe or the Secretary
- States must provide BIA with final adoption decrees of Indian child
 - See rule for what information must be included with decrees

Recordkeeping & Ongoing Obligations

- **Adoption Falls Through**
 - Court must notify biological parent (or prior Indian custodian) and Tribe whenever:
 - A final adoption decree has been vacated or set aside; or
 - Adoptive parent has voluntarily consented to the termination of his or her parental rights to the child
- **Adult Adoptee Applies for Information**
 - Upon the application adult adoptee, the court that entered the final decree of adoption must inform the adoptee of parents' Tribal affiliations and provide other information necessary to protect any rights resulting from the individual's Tribal relationship

Effective Date of the New Rule

- The rule is effective on **Monday, December 12, 2016**
 - Affects all Indian child-welfare proceedings initiated after **Monday, December 12**

Federal Implementation & Resources

Federal Implementation of ICWA

- Federal inter-agency ICWA workgroup
 - U.S. Department of the Interior
 - Assistant Secretary – Indian Affairs
 - Bureau of Indian Affairs
 - U.S. Department of Health & Human Services (HHS)
 - Administration on Children, Youth, and Families, Children's Bureau (ACYF)
 - U.S. Department of Justice

ICWA-Related Resources from BIA

- Go to: www.bia.gov, and click on the “Indian Child Welfare Act” icon in the right-hand margin
 - This training material
 - Copies of handouts
 - More in-depth training materials
 - The final rule
 - Information on the inter-agency partnership
 - When finalized, the updated guidelines

ICWA-Related Resources from ACYF

- Available from the Capacity Building Collaborative and Center for States on <https://capacity.childwelfare.gov/>
 - **Authentic Voices Video Series.**
 - **LGBTQ Toolkit** (expected release September 2016)
 - **State/Tribal Partnerships Learning Experience** (expected release late September 2016)

ICWA-Related Resources from ACYF (cont'd)

- Available from the Child Welfare Information Gateway:
<https://www.childwelfare.gov>
 - Tribal-State Relations,
 - Major Federal Legislation Concerned With Child Protection, Child Welfare, and Adoption
 - Information Gateway's Adoption Triad, Customary Adoption
- **Web Sections**
 - Indian Child Welfare Act
 - Training Resources for Working With American Indian and Alaska Native Families
 - Topical Training for Caseworkers: Working With American Indian Families
 - Developing Culturally Competent Adoption Services
 - Children From Minority Groups in Out-of-Home Care
 - Permanency and American Indian Children

Questions?

- **Implementation Questions:**
 - Debra Burton, ICWA Specialist, BIA
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