

## **Overview of the Bureau of Indian Affairs (BIA) Guidelines for State Courts and Agencies in Indian Child Custody Proceedings (Effective February 25, 2015)**

These guidelines are an update of the guidelines published in 1979. These guidelines provide standard procedures and best practices to State courts and child welfare agencies for compliance with the Indian Child Welfare Act (ICWA). These updated guidelines supersede and replace the 1979 guidelines.

Please note that the comments sections of the 1979 guidelines are removed from the 2015 guidelines.

### **Section A. General Provisions (formerly, entitled “Policy”)**

This section is extensively expanded and divided into five subsections.

#### **A.1. What is the purpose of these guidelines?**

To clarify ICWA implementation requirements, provide best practices, ensure consistent ICWA implementation nationwide, and apply ICWA provisions in all stages of proceedings in which ICWA applies.

#### **A.2. What terms do I need to know?**

These guidelines include a definitions subsection under Section A. Terms that are not specifically defined by ICWA are listed below.

- Active Efforts – not defined in ICWA and expands on Section D.2. of the 1979 guidelines. Due to inconsistent interpretation nationwide, this definition includes numerous examples.
- Agency – not defined in ICWA or the 1979 guidelines.
- Continued Custody – not defined in ICWA or the 1979 guidelines. Likely based on *Adoptive Couple v. Baby Girl*, 570 U. S. \_\_\_\_ (2013)
- Custody – not defined in ICWA or the 1979 guidelines. Likely based on *Adoptive Couple v. Baby Girl*, 570 U. S. \_\_\_\_ (2013).
- Domicile – not defined in ICWA or the 1979 guidelines. Based on *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).
- Imminent physical damage or harm – not defined in ICWA or the 1979 guidelines.
- Parent – partially defined in ICWA. Includes additional information based on *Adoptive Couple v. Baby Girl*, 570 U. S. \_\_\_\_ (2013).
- Status offenses – based on Section B.3. of the 1979 guidelines.
- Upon Demand – not defined in ICWA or the 1979 guidelines.
- Voluntary Placement - not defined in ICWA or the 1979 guidelines.

#### **A.3. When does ICWA apply?**

This subsection incorporates much of Section B.3. of the 1979 guidelines, Determination that Placement is Covered by the Act. Additionally, this section includes:

- Agencies and State courts must ask in every applicable proceeding whether ICWA applies.
- As a best practice, courts should apply ICWA procedures when a child is not removed from the home so tribes may intervene as early as possible.
- When agencies and State courts have reason to know a child is an Indian child, ICWA procedures must be applied until a conclusive determination the child is not an Indian child.
- There is no exception to ICWA based on the Existing Indian Family (EIF) doctrine. A.3.(b) includes a non-exhaustive list of factors that should not be considered when determining whether ICWA applies.

This subsection is intended to ensure that the question about ICWA applicability is asked early and often until a determination is made.

#### **A.4. How do I contact a tribe under these guidelines?**

This is a new subsection with instructions on how to contact a tribe.

#### **A.5 How do these guidelines interact with State laws?**

The guidelines should be applied in all ICWA applicable child custody proceedings. Where applicable State or Federal law provides higher protection than ICWA, the State court must apply the higher standard.

### **Section B. Pretrial Requirements**

This section promotes the early identification of ICWA applicability.

#### **B.1. When does the requirement for active efforts begin?**

This subsection clarifies that the requirement begins when the possibility arises that the agency case or investigation may result in placement outside the home, including during the investigation of whether a child is an Indian child.

#### **B.2. What actions must an agency and State court undertake in order to determine whether a child is an Indian child?**

Agencies and Courts must inquire whether there is reason to believe the child is an Indian child. Courts must ask for certification on the record of the information used to make the determination, including genograms or ancestry charts. Information which constitutes “reason to believe” is listed in this section.

#### **B.3. Who makes the determination as to whether a child is a member of a tribe?**

The tribe alone is responsible for determining tribal membership.

**B.4 What is the procedure for determining an Indian child’s tribe when the child is a member or eligible for membership in more than one tribe?**

ICWA requires that the tribe with more significant contacts be designated the child’s tribe. Similar to the 1979 guidelines, this subsection includes a list of factors to consider when determining significant contacts. The factors are updated to add the parents’ membership preference and delete subjective factors and those inapplicable to infants.

This subsection removes the requirement from the 1979 guidelines that the court must determine significant contacts.

**B.5. When must a State court dismiss an action?**

This subsection expands and clarifies Section B.4. of the 1979 guidelines, Determination of Jurisdiction. Unless an emergency removal governed by 25 U.S.C. § 1922, the proceeding must be dismissed as soon as the State court determines it does not have jurisdiction.

**B.6. What are the notice requirements for a child custody proceeding involving an Indian child?**

The notice requirements remain similar to the 1979 guidelines. Notice updates in these guidelines include clarification that notice is required for each proceeding and the tribe has the right to intervene at any time. In addition, notice must be sent by registered mail, return receipt requested. Other types of service are additional and not in lieu of registered mail.

**B.7. What time limits and extensions apply?**

This subsection remains essentially unchanged from Section B.6. of the 1979 guidelines, Time Limits and Extensions.

**B.8. What is the process emergency removal of an Indian child?**

This subsection expands upon Section B.7. of the 1979 guidelines, Emergency Removal of an Indian Child.

- The guidelines for emergency removal apply whether the Indian child is a resident of or domiciled on a reservation.
- The standard for emergency removal is “necessary to prevent imminent physical damage or harm to the child.” Examples are provided.
- Emergency removal must be as short as possible. Guidance is provided on ensuring removal is short-term.
- Time period for temporary custody without a hearing is shortened from 90 days to 30 days.

**B.9. What are the procedures for determining improper removal?**

This subsection remains essentially unchanged from Section B.8. of the 1979 guidelines, Improper Removal From Custody.

### **Section C. Procedures for Making Requests for Transfer to Tribal Court**

#### **C.1. How are petitions for transfer of proceeding made?**

The requirement in the 1979 guidelines to make the transfer request promptly after receiving notice of the State court proceeding is deleted. This subsection clarifies that the right to transfer is available at any stage of a child custody proceeding.

#### **C.2. What are the criteria and procedures for ruling on transfer petitions?**

This subsection remains essentially unchanged from Section C.2.(a) of the 1979 guidelines, Criteria and Procedures for Ruling on 25 U.S.C. § 1911(b) Transfer Petitions.

#### **C.3. How is determination of “good cause” made?**

This subsection states that due to the concurrent jurisdiction of the State and tribal courts, and that ICWA seeks to protect the rights of Indian children, Indian communities and tribes, transfer is presumptively in the best interest of the Indian child. The 1979 guidelines “good cause” factors of Section C.3. are deleted and updated with factors that should not be considered in a “good cause” determination. Including:

- Advanced stage of the proceedings;
- Whether transfer may result in placement change;
- Indian child’s level of contacts with the tribe;
- Socio-economic conditions of the tribe; or
- Perceived inadequacy of the social services or judicial systems.

#### **C.4. What happens when a petition for transfer is made?**

This subsection incorporates Section C.4 of the 1979 guidelines, Tribal Court Declination of Transfer. These guidelines remove the requirement of parties to file arguments about the transfer in tribal court.

### **D. Adjudication of Involuntary Placements, Adoptions, or Terminations of Parental Rights**

#### **D. 1. Who has access to reports or records?**

This subsection remains essentially unchanged from Section D.1. of the 1979 guidelines, Access to Reports.

#### **D.2. What steps must a party take to petition a State court for certain actions involving an Indian child?**

This subsection incorporates Section D.2. of the 1979 guidelines, Efforts to Alleviate Need to Remove Child From Parents or Indian Custodians. Subsection D.2.(a) clarifies that the petitioner must establish that active efforts were made “prior to” and “until the commencement of” the proceeding. Subsection D.2.(b) clarifies that active efforts must be documented in detail.

### **D.3. What are the applicable standards of evidence?**

This subsection incorporates Section D.3. of the 1979 guidelines, Standards of Evidence. Subsection D.3.(c) clarifies that a causal link must be established between the particular conditions existing in the home and the likelihood of serious emotional or physical harm to the Indian child.

### **D.4. Who may serve as a qualified expert witness?**

This subsection emphasizes prioritizing qualified expert witnesses with specific knowledge of the tribal community. Section D.4.(b)(iii) of the 1979 guidelines, “A professional person having substantial education and experience in the area of his or her specialty,” is removed entirely from these guidelines.

## **E. Voluntary Proceedings**

### **E.1. What actions must an agency and State court undertake in voluntary proceedings?**

This subsection clarifies that Agencies and courts must determine whether ICWA applies and provide notice to tribes, with reference to subsections B.2. to B.4. and B.6. of these guidelines.

### **E.2. How is consent to termination of parental rights, foster care placement or adoption obtained?**

This subsection remains essentially unchanged from Section E.1. of the 1979 guidelines, Execution of Consent.

### **E.3. What information should the consent document contain?**

This subsection incorporates Section E.2 of the 1979 guidelines, Content of Consent Document. These guidelines clarify that the consent document must identify any conditions to the consent and explain the consequences of the conditions.

### **E.4. How is withdrawal of consent achieved in a voluntary foster care placement?**

This subsection remains essentially unchanged from Section E.3. of the 1979 guidelines, Withdrawal of Consent to Placement.

### **E.5. How is withdrawal of consent achieved to a voluntary adoption achieved?**

This subsection remains essentially unchanged from Section E.4. of the 1979 guidelines, Withdrawal of Consent to Adoption.

## **F. Dispositions**

### **F.1. When to the placement preferences apply?**

This subsection emphasizes that ICWA placement preferences apply in preadoptive, adoptive and foster care placements. In particular:

- If the Indian child’s tribe establishes a different preference order by resolution, the Agency or court must apply those placement preferences.
- When preferences cannot be met, these guidelines clarify that the Agency must show by clear and convincing evidence that a diligent effort was made to satisfy the preferences. Please note that the clear and convincing evidence requirement in this subsection does not appear in ICWA, North Dakota statutory or case law, or the 1979 guidelines.
- Good cause deviation from placement preferences should be determined by the court. Please note that specifically requiring the court to make this determination does not appear in ICWA, North Dakota statutory or case law, or the 1979 guidelines.

### **F.2. What placement preferences apply in adoptive placements?**

This subsection remains essentially unchanged from Section F.1. of the 1979 guidelines, Adoptive Placements.

### **F.3. What placement preferences apply in foster care or preadoptive placements?**

This subsection remains essentially unchanged from Section F.2. of the 1979 guidelines, Foster Care or Preadoptive Placements.

### **F.4. How is a determination for “good cause” to depart from placement procedures made?**

This subsection expands upon Section F.3. of the 1979 guidelines, Good Cause to Modify Preferences.

- The party asserting good cause to deviate must state the reasons orally on the record or in writing.
- The burden of proof (clear and convincing evidence) is on the asserting party. Please note that the clear and convincing evidence requirement in this subsection does not appear in ICWA, North Dakota statutory or case law, or the 1979 guidelines.
- The prevailing social and cultural standards of the tribal community must be included in analysis of placement availability.
- Good cause does not include a best interest of the child analysis or the socio-economic status of a potential placement within the preferences.

## **G. Post-Trial Rights**

### **G.1. What is the procedure for petitioning to vacate an adoption?**

This subsection incorporates Section G.1. of the 1979 guidelines, Petition to Vacate Adoption. Subsection G.1.(a) clarifies that a petition to vacate may be based on grounds that a proceeding that failed to comply with ICWA.

**G.2. Who can make a petition to invalidate an action?**

This is a new subsection that clarifies an Indian child, parent, Indian custodian or tribe may petition the State court to invalidate an action, even if the petitioner’s rights were not directly violated during the foster care or termination of parental rights proceeding. The grounds for the petition is a violation of any provision of 25 U.S.C. § 1911 (jurisdiction), 25 U.S.C. § 1912 (pending court proceedings), or 25 U.S.C. § 1913 (voluntary proceedings).

**G.3. What are the rights of adult adoptees?**

This subsection incorporates Section G.2. of the 1979 guidelines, Adult Adoptee Rights. These guidelines clarify this section applies when the original adoption was not subject to ICWA. In states with privacy prohibitions on biological parent information, attempts should be made by the Agency to facilitate tribal membership for the adult adoptee.

**G.4. When must notice of a change in child’s status be given?**

This subsection remains essentially unchanged from Section G.3. of the 1979 guidelines, Notice of Change in Child’s Status.

**G.5. What information must States furnish to the Bureau of Indian Affairs?**

This is a new subsection with detailed instructions on providing information to the Bureau of Indian Affairs upon entering a final adoption decree in State court.

**G.6. How must the State maintain records?**

This subsection remains essentially unchanged from Section G.4. of the 1979 guidelines, Maintenance of Records.