



# **BIA ICWA REGULATIONS HANDBOOK**

*Presented by*



*through the support of California Department of Social Services (CDSS)*

## Use and Disclaimers

This presentation does not address every part of the new BIA ICWA Regulations, nor does it address every difference between the Regulations and current California law. Rather our purpose is to highlight some of the significant differences between the new Regulations and California law and discuss ways the two sets might be harmonized for the sake of consistency.

## Credits

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# **BIA ICWA REGULATIONS**

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# BIA ICWA REGULATIONS

## Outline of Course

Presented by Mark Vezzola – CILS Directing Attorney, Escondido  
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# BIA ICWA Regulations

Presented by

Mark Vezzola & Jasmine Andreas

California Indian Legal Services  
through a grant from the California Department of Social Services



## Presentation Materials

- Power Point Presentation
- Outline of Topics Presented
- Full Text of BIA ICWA Regulations
- Activity Sheets



95<sup>TH</sup> CONGRESS  
1<sup>ST</sup> SESSION

## S. 1214

IN THE SENATE OF THE UNITED STATES

“Officials seemingly would rather place Indian children in non-Indian settings where their Indian culture, their Indian traditions and, in general, their entire Indian way of life is smothered. The Federal Government for its part has been conspicuous by its lack of action.... This course can only weaken rather than strengthen the Indian child, the family, and the community. This, at a time when the Federal Government purports to be working to help strengthen Indian communities. It has been called cultural genocide.”

Sen. James Abourezk (D-South Dakota)  
U.S. Senate Committee on Indian Affairs  
1977

## Background: Identifying the Problem

After finding that Indian children were being removed from their homes at a rate higher than non-Indian children (35%) due to cultural bias and ignorance, Congress in 1978 passed the Indian Child Welfare Act (ICWA) to establish minimum federal standards for state child custody proceedings involving an “Indian child.”

Indian Child Welfare Act, 25 USC § 1901, et seq.





## How ICWA Addresses the Problem

- The ICWA provides minimum standards; states can adopt higher standards (CA has done so)
- Limits when an Indian child can be removed from its home;
- Allows foster care and/or termination of parental rights only if a certain standard of evidence is met;
- Requires active efforts to prevent involuntary removal and reunify the Indian family;
- Provides placement preferences in cases where foster care or adoption is appropriate unless good cause exists to deviate.

## Steps Towards Clarifying ICWA

- BIA issued ICWA regulations in 1979 & 1994 and Guidelines in 1979 and 2015, updated again in 2016 to complement the regulations;
- Guidelines and Regulations did not fundamentally change the ICWA, but clarified it;
- A final rule (25 CFR 23, 81 Fed. Register 38778) implemented the ICWA regulations that went into effect on December 12, 2016.

## Why Does ICWA Need Clarification?

- States have implemented the Act inconsistently over the years;
- Varying and sometimes conflicting interpretations to certain parts of the Act; and
- Disproportionately high rate of removal of Indian children compared to other children still exist.



ICWA Advocate Guide  
for California Courts  
by  
California Indian Legal Services

## 2016 ICWA Regulations

- Regulations apply to Indian child-welfare proceedings initiated after December 12, 2016; but do not affect child-welfare proceedings initiated prior to that date; however
- The Regulations apply to “subsequent proceedings” in the same matter including those affecting custody or placement of the same child initiated after December 12, 2016;
- Example: a case may have involved a detention prior to 12/12/16 but a termination of parental rights hearing after that date would be considered a “subsequent hearing.”

## Disclaimer

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## Subpart A- Purpose, Definitions, Policy Section 23.2 Definitions New and Amended



## Definition of **Active Efforts** (1)

### **New Commentary:**

- States were inconsistent in how to demonstrate “active efforts” and the BIA found “compelling” reasons for setting a nationwide definition.
- As the agency is involved this requires assisting parents through the steps of a case plan, including accessing services and resources.
- Active efforts cannot be “passive.”
- Seen in Involuntary Proceedings § 23.120.

## Definition of **Active Efforts** (2)

- Active efforts “means affirmative, active, thorough, and timely efforts;”
- They are intended primarily to maintain or reunite an Indian child with his or her family;

## Definition of Active Efforts (3)

- (cont.) To the *maximum extent possible*, active efforts should be provided in a *manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe* and should be conducted in *partnership with*
  - the Indian child and
  - the Indian child's parents,
  - extended family members,
  - Indian custodians, and Tribe.
- Active efforts are to be *tailored to the facts and circumstances of the case...*”

## Definition of Active Efforts (4)

### BIA ICWA Regulation § 23.2

The new regulations includes a definition of **active efforts** that gives 11 examples, including the following:

- Identifying appropriate services and helping parents overcome barriers including actively assisting parents in obtaining such services;
- Taking steps to keep siblings together whenever possible
- Identifying, notifying and inviting tribal reps to participate in providing support and services to Indian child's family and in family team meetings.

### CA WIC § 361.7

- States that what constitutes “active efforts” be assessed on a case by case basis but unlike BIA ICWA Regulation § 23.2, does not list examples.
- Similar social and cultural component
- Perhaps CA law should be revised to more closely match the new Regulation? Examples are helpful.

## Discussion of **Active Efforts**

- What makes some efforts “active”?
- How do you distinguish them from other efforts?
- What are some common examples of active efforts?
- Is offering reunification services a form of active efforts?

## Definition of **Child Custody Proceeding**

### **Revised Commentary:**

- Makes clear ICWA applies when the court is considering a foster-care placement, even if they ultimately decide to return the child to the parents.
- Addresses “status offenses” to clarify exclusion of placements based on adult criminal acts.
- Various provisions affected, most importantly defines proceedings in which ICWA applies.

## Definition of **Child Custody Proceeding**

- (1) “Child-custody proceeding” means and includes any action, other than an emergency proceeding, that may culminate in one of the following outcomes:
- Commentary: Emergency proceeding now has its own definition.

## Definition of **Child Custody Proceeding**

- ~~(1)(i) Foster-care placement, which shall mean~~ any action removing an Indian child from his or her parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;
- ~~(2)(ii) Termination of parental rights, which shall mean~~ any action resulting in the termination of the parent-child relationship;
- ~~(3)(iii) Preadoptive placement, which shall mean~~ the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; or
- ~~(4)(iv) Adoptive placement, which shall mean~~ the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption; and.

## Definition of **Child Custody Proceeding**

- ~~(5) Other tribal placements made in accordance with the placement preferences of the Act, including the temporary or permanent placement of an Indian child in accordance with tribal children's codes and local tribal custom or tradition;~~
- ~~(6) The above terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime in the jurisdiction where the act occurred or upon an award, in a divorce proceeding, of custody to one of the parents.~~

## Definition of **Child Custody Proceeding**

- (2) An action that may culminate in one of these four outcomes is considered a separate child-custody proceeding from an action that may culminate in a different one of these four outcomes. There may be several child-custody proceedings involving any given Indian child. Within each child-custody proceeding, there may be several hearings. If a child is placed in foster care or another out-of-home placement as a result of a status offense, that status offense proceeding is a child-custody proceeding.



## Definition of **Child Custody Proceeding**

### BIA ICWA Regulation § 23.2

Under the definition of **child custody proceedings**, the regulation clarifies there may be multiple “proceedings” within a single case, such a “proceeding” to determine foster care placement and a separate “proceeding” to terminate parental rights.

### CA WIC § 224.1(d)

California law currently requires ICWA notice for each “hearing” but under the new regulation formal ICWA notice would be required only for each separate “proceeding.”

Perhaps California law should be revised to mimic that set out in the regulations. Then again, the law with the higher standards should probably be followed.

## Definition of **Custody and Continued Custody**

### **New Commentary:**

- Important to keep in mind, as the definitions of Custody and Continued Custody can and will affect the rights of those who have had Custody or Continued Custody, for example rights of parents, legal guardians, or Indian custodians depending on if they have Custody or have had Continued Custody.
- The term “custody” is included over 100 times in the new regulations.

## Definition of Custody and Continued Custody

- “**Continued custody** means *physical custody or legal custody or both*, under any applicable Tribal law or Tribal custom or State law, that a parent or Indian custodian *already has or had at any point in the past*. The *biological mother* of a child has had custody of a child.”
- “**Custody** means *physical custody or legal custody or both*, under any applicable Tribal law or Tribal custom or State law. A party *may demonstrate the existence of custody by looking to Tribal law or Tribal custom or State law.*”

## Definition of Custody & Continued Custody

### BIA ICWA Regulation § 23.2

Custody is defined under the new regulations as physical or legal custody or both under tribal law, custom or state law.

According to the new regulations continued custody means physical or legal custody under tribal law, custom or state law that a parent or Indian custodian already has or has had at any point in the past.

### No applicable CA law

These changes, which are not reflected in CA law, are likely in response to the Supreme Court’s decision in *Adoptive Couple v. Baby Girl* (2013), 133 S. Ct. 2552, which found the active efforts requirement and placement preferences do not apply when a parent has never had prior legal or physical custody of a child and where no party within the preferences sought to adopt the child.

## Definition of **Domicile**

### **New Commentary:**

- New definitions aligns with Federal common law.
- Clarifies domicile of child whose parents are not married becomes domicile of custodial parent.
- Seen in:
  - § 23.107 to assist determining an Indian child;
  - § 23.109 factor in determining Indian child's Tribe;
  - § 23.110 helps determine if a Tribe has exclusive jurisdiction, and state court must dismiss; and
  - § 23.113 involved in multiple requirements involving petition for emergency proceedings.

## Definition of **Domicile**

- (1) For a *parent or Indian custodian*, the place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain indefinitely even though the person may be currently residing elsewhere.
- (2) For an *Indian child*, the domicile of the Indian child's parents or Indian custodian or guardian. In the case of an Indian child whose parents are not married to each other, the domicile of the Indian child's custodial parent

## Definition of **Domicile**

### BIA ICWA Regulation § 23.2

Separate definitions for domicile of parents or Indian Custodian.

Indian Child's domicile is that of the parent/custodian/guardian, if not married then the custodial parent.

### CA WIC § 305.5(d)

Child's domicile is determined by the parent/guardian/custodian who the child has primary residence with, so mildly different.

## Why Does Domicile Matter?

Tribes' exclusive jurisdiction over Indian children is determined by the child's domicile or residence.

Determining domicile affects jurisdiction. The U.S. Supreme Court in *Mississippi Choctaw v. Holyfield* said a minor's domicile is determined by that of his or her parents or with the mother where the parents are not married. See 490 U.S. 30 (1989).

The newborn twins in Holyfield were found to share the domicile of their parents (who wanted to place them for adoption with a non-Indian couple) even though they were born off the reservation. The parents were domiciled on the reservation and so were the children; ICWA did not apply.

## Definition of **Emergency Proceeding**

### BIA ICWA Regulation § 23.2

“**Emergency proceeding** means and includes any court action involving the emergency removal or emergency placement of an Indian child.”

#### **New Commentary:**

- Created in response to a lack of clarity regarding these types of proceedings.
- Used in § 23.113 which creates separate standards for emergency proceedings.

### No applicable CA law

CA law does not include a definition of **emergency proceeding**.

## Definition of **Extended Family Member**

#### **Revised Commentary:**

- Follows statutory definition.
- Reminder: extended family member is not limited to Native American or Tribal individuals.
- Can be more expansive to other family members if law or custom of the Indian child’s Tribe includes other relatives.
- Included in Active Efforts Definition and its requirements; and is included in § 23.132 in consideration to depart from placement preferences.
- No substantive changes in language.

## Definition of **Extended Family Member**

### BIA ICWA Regulation § 23.2

Under the new regulations, an **extended family member** is defined by the law or custom of the Indian child's tribe or, if none, a person who has reached age 18 and who is the Indian child's grandparent, aunt, uncle, brother, sister, brother-in-law, sister-in-law, niece or nephew, first or second cousin, or stepparent.

### CA WIC § 224.1(c)

California law states that the term **extended family member** is defined under section 1903 of the Indian Child Welfare Act which is identical to the regulation.

## Non-Relative Extended Family Member (NREFM)

- Under CA Law NREFM is an adult caregiver who has an established familial relationship with a relative of the child or a familial or mentoring relationship with the child. [Welfare & Institutions Code § 362.7, § 361.3](#)
- This shall be verified through the existence of a relationship through interviews with the parent and child or with one or more third parties which may include relatives, teachers, medical professionals, clergy, neighbors, and family friends.
- NREFM must be assessed just as potential foster care placements and if their request for placement is denied, they are entitled to a state hearing.
- They may also submit information to the court.

## Definition of **Indian Child**

### Revised Commentary:

- Clarifies and includes terms of “citizen” and “citizenship” along with “member” and “membership.”
- Term is used over 200 times in the new regulations, BUT its most important use is determining if ICWA applies. ICWA only applies if there is an “Indian Child.”
- No major language changes in revisions.

## Definition of **Indian Child**

### BIA ICWA Regulation § 23.2

Indian child means any unmarried person who is under 18 and either: (1) a member or citizen of an Indian tribe; or (2) is eligible for membership or citizenship in an Indian tribe and is the biological child of a member/citizen of an Indian tribe.

### CA WIC § 224.1(a)

California law uses the definition contained in the original text of the Indian Child Welfare Act which uses the words “member” and “membership” so there is no conflict between the definitions but the regulations clarify that membership in a tribe is equivalent to citizenship in a tribe.

## Definition of **Indian Child's Tribe**

### Revised Commentary:

- Follows statutory definition, but does refer to the new process in the regulations at § 23.109 to make the multi-tribe determination.
- MULTIPLE EFFECTS: the determined Tribe will have the right to intervene, will receive notices, etc.

## Definition of **Indian Child's Tribe**

Notable change in (2):

(2) In the case of an Indian child who is a member of or is eligible for membership in more than one ~~tribe~~Tribe, the Indian ~~tribe with which the Indian child has the more significant contacts, to be determined in accordance with the BIA's "Guidelines for State Courts—Indian Child Custody Proceedings."~~Tribe described in §23.109.



## Definition of Indian Child's Tribe

### BIA ICWA Regulation § 23.2

Includes Tribe where child is a member or is eligible to be a member

BUT where a child is a member of is eligible for membership in more than one Tribe, refers to the new process in § 23.109 to determine the child's Tribe which has very particular steps to make a determination

### CA WIC §224.1(e)

No similar provision, but § 224.1(e) mandates the Court to determine the child's Tribe and provisions are similar to § 23.109 BUT has a significant contact test if a child is a member of more than 1 tribe or is not enrolled but is eligible for membership in more than 1 tribe; the new § 23.2 allows the Tribes to determine instead and provides a process that if not resolved will refer to significant contacts with similar but different factors to CA law.

## Definition of Indian Custodian

### Revised Commentary:

- Follows statutory definition.
- One is allowed to demonstrate they are an Indian Custodian through Tribal law.
- Large implications as Indian Custodian often has the same rights as a parent.
- Used in the regulations almost every time "parent" is used.

## Definition of **Indian Custodian**

*Indian custodian* means any Indian person who has legal custody of an Indian child under applicable Tribal law or custom or under applicable State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child. An Indian may demonstrate that he or she is an Indian custodian by looking to Tribal law or Tribal custom or State law.

## Definition of **Indian Custodian**

### BIA ICWA Regulation § 23.2

According to the new regulations an **Indian Custodian** is an Indian who has legal custody of an Indian child under applicable Tribal law or custom or under applicable State law, or to whom temporary physical care, custody or control has been transferred by the parent; an Indian may show he or she is an **Indian Custodian** by looking to Tribal law, Tribal custom or State law.

### CA WIC § 224.1(a)

Again, California law refers to the ICWA's definition of **Indian Custodian** but the Regulations allow someone trying to show Indian custodianship to look to any of these sources – Tribal law, Tribal custom or State law, to demonstrate it.

## Definition of **Indian Foster Home**

### **New Commentary:**

- Indian Foster Home is the third preference for foster-care or pre-adoptive placements.
- Found in § 23.131 of regulations.

## Definition of **Indian Foster Home**

### **BIA ICWA Regulation § 23.2**

**Indian foster home** means a foster home where one or more of the licensed or approved foster parents is an 'Indian' as defined in the Indian Child Welfare Act.

### **CA WIC § 361.31(b)(3)**

California law does not have a definition for **Indian foster home** but uses that term when listing placement preferences. It refers to any foster home licensed or approved by a tribe, regardless of whether one foster parent is Indian, followed by an Indian foster home in the list of preferences.

## Definition of **Involuntary Proceedings**

### **New Commentary:**

- Determination of an involuntary proceeding means the **active efforts** requirement must be met, higher standards of evidence will come into play, and a qualified expert witness will be required unless waived.

## Definition of **Involuntary Proceedings**

### **BIA ICWA Regulation § 23.2**

*“Involuntary proceeding means a child-custody proceeding in which the parent does not consent of his or her free will to the foster-care, pre-adoptive, or adoptive placement or termination of parental rights or in which the parent consents to the foster-care, pre-adoptive, or adoptive placement under threat of removal of the child by a State court or agency.”*

### **No applicable CA law**

No parallel CA law but it makes very clear that any placement by consent of the parent that is coerced or threatened with removal by a State court or agency is NOT voluntary and will fall under the provisions of this section.

## Definition of Parent(s)

### Revised Commentary:

- Follows statutory definition.
- Response to comments on the definition declined to include any language requiring an unwed father to take reasonable steps establishing or acknowledging paternity stating the Supreme Court and other case law has already established a constitutional status for rights of unwed fathers “that an unwed father who ‘manifests an interest in developing a relationship with [his] child cannot constitutionally be denied parental status based solely on a failure to comply with technical requirements establishing paternity.’”

## Definition of Parent(s)

*Parent or parents* means ~~the~~any biological parent or parents of an Indian child, or any Indian ~~person~~ who has lawfully adopted an Indian child, including adoptions under ~~tribal~~Tribal law or custom. ~~The term~~It does not include ~~the~~an unwed biological father where paternity has not been acknowledged or established.

## Definition of Parent(s)

### BIA ICWA Regulation § 23.2

The new definition clarifies that a parent is NOT an “unwed biological father” where paternity was not acknowledged or established, limiting the exclusion to unwed biological fathers instead of just unwed fathers.

### CA WIC § 224.1(c)

Defines parent as used in ICWA, which does not state “unwed biological father” but instead “unwed father”

## Definition of Reservation

### Revised Commentary:

- Follows statutory definition.
- No substantive changes.

## Definition of **Reservation**

### BIA ICWA Regulation § 23.2

*“Reservation means Indian country as defined in 18 U.S.C 1151 and any lands, not covered under that section, title to which is held by the United States in trust for the benefit of any Indian Tribe or individual or held by any Indian Tribe or individual subject to a restriction by the United States against alienation.”*

### CA WIC §224.1(a)

Defines Reservation as used in ICWA § 1903, no substantive difference from regulation definition.

## Definition of **Status Offenses**

### **New Commentary:**

- Included in definition of what can be a Child-custody proceeding.
- In § 23.103 as potential for ICWA applying to offenses if any part of the proceeding results in the need for out-of-home placement of the child.

## Definition of **Status Offenses**

### BIA ICWA Regulation § 23.2

“*Status offenses* mean offenses that would not be considered criminal if committed by an adult; they are acts prohibited only because of a person's status as a minor (e.g., truancy, incorrigibility).”

### No applicable CA law

Likely this provision addresses California Supreme Court decision *In re W.B.* (2012), as later in the regulations at § 23.103(a)(1)(iii) states ICWA is applicable to: A proceeding involving status offenses if any part of the proceeding results in the need for out-of-home placement of the child, including a foster-care, pre-adoptive, or adoptive placement, or termination of parental rights.

## Definition of **Tribal Court**

### Revised Commentary:

- Follows statutory definition.
- Commentary acknowledges that this includes Tribal governing bodies such as Tribal Council's under the inclusion of “other administrative body of a tribe vested with authority over child-custody proceedings.”
- Most notably used in the Petition to Transfer to Tribal Court section of new regulations.
- No substantive changes.



## Definition of Tribal Court

### BIA ICWA Regulation § 23.2

*“Tribal court”* means a court with jurisdiction over child-custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian Tribe, or any other administrative body of a Tribe vested with authority over child-custody proceedings.”

### CA WIC §224.1(a)

Defines “tribal court” as used in ICWA 1903, which has almost identical language to the regulation.

## Definition of Upon Demand

### **New Commentary:**

- Important provision for determining application of ICWA, if a parent cannot have a child back upon demand it makes the proceeding subject to the involuntary proceedings requirements.
- If parents can regain custody upon demand then the placements are not subject to ICWA (e.g. divorce or any voluntary placement chose by a parent or Indian custodian without threat of removal by a state agency).
- See definition of Child-custody proceeding, and § 23.103  
When does ICWA apply?

## Definition of **Upon Demand**

### BIA ICWA Regulation § 23.2

*“Upon demand means that the parent or Indian custodian can regain custody simply upon verbal request, without any formalities or contingencies.”*

### CA WIC §224.1(d)

No similar provision, but 224.1(d) uses the “upon demand” language and just the same as in Probate Code § 1459.5(a)(1) for guardianship provisions.

## Definition of **Voluntary Proceeding**

### **New**

#### **Commentary:**

- Section 23.103(b)(4) states ICWA does not apply to a voluntary placement.
- Most notably Voluntary Proceeding have their own separate requirements starting at § 23.124.

## Definition of **Voluntary Proceeding**

### BIA ICWA Regulation § 23.2

“*Voluntary proceeding* means a child-custody proceeding that is not an involuntary proceeding, such as a proceeding for foster-care, pre-adoptive, or adoptive placement that either parent, both parents, or the Indian custodian has, of his or her or their free will, without a threat of removal by a State agency, consented to for the Indian child, or a proceeding for voluntary termination of parental rights.”

### No applicable CA law

While there is no analogous California law on point, concerns remain regarding a proceeding being considered voluntary at some point after it was involuntary.

## Definitions Wrap Up

Other terms BIA ICWA Regulation § 23.2 deserve some mention:

- **Secretary** (of Interior) is not defined in California’s Welfare & Institution Code; and
- **Hearing** which has plain meaning.

## Subpart B- Notice of Involuntary Child Custody Proceedings and Payment for Appointed Counsel in State Courts

### Section 23.11 Notice

## 23.11 Change in Notice Provision

### BIA ICWA Regulation § 23.11(a)

- New regulation requires notice in involuntary proceedings only;
- Notice must be sent when “the identity and location of the child’s parent or Indian custodian or Tribe is known;”
- Many requirements put into new Section §23.111;
- California §23.11(b)(12) gives Sacramento Regional Director for BIA notice.

### CA WIC § 224.2

- California law requires notice be sent in both voluntary and involuntary proceedings involving an Indian child;
- Notice required to potentially affiliated tribes even if identity of a child’s tribe not known but information connects him/her with a particular tribe or tribes;
- California law therefore sets a higher standard for notice.

## New Subpart of ICWA Regulations

- Subpart I-Indian Child Welfare Act Proceedings
  - General Provisions
  - Pretrial Requirements
  - Petitions to Transfer to Tribal Court
  - Adjudication of Involuntary Proceedings
  - Voluntary Proceedings

## New Subpart of ICWA Regulations

- Subpart I-Indian Child Welfare Act Proceedings
  - Dispositions
  - Access
  - Post-Trial Rights and Responsibilities
  - Recordkeeping
  - Effective Date
  - Severability

## General Provisions Section 23.101 et seq.

## When Does ICWA Apply?

### **BIA ICWA Regulation § 23.103**

Sets out ICWA requirements and when they apply, including at “emergency proceedings”

### **CA WIC § 224**

California law does not address how ICWA applies at emergency proceedings;

Few ICWA provisions are applied at detention;

Most (i.e. active efforts, placement preferences) come into play at disposition;

But CA Rule of Court § 5.480 addresses when it applies.

## §23.104 What provisions of this subpart apply to each type of child-custody proceeding?

Section	Type of Proceeding
23.101-23.106 (General Provisions)	Emergency, Involuntary, Voluntary
<b>Pre Trial Requirements</b>	
23.107 (How should a State court determine if there is reason to know the child is an Indian child?)	Emergency, Involuntary, Voluntary
23.108 (Who makes the determination as to whether a child is a member whether a child is eligible for membership, or whether a biological parent is a member of a Tribe?)	Emergency, Involuntary, Voluntary
23.109 (How should a State court determine an Indian child's Tribe when the child may be a member or eligible for membership in more than one Tribe?)	Emergency, Involuntary, Voluntary
23.110 (When must a State court dismiss an action?)	Involuntary, Voluntary

## §23.104 (Cont.) What provisions apply to each type of child-custody proceeding?

Section	Type of Proceeding
23.111 (What are the notice requirements for a child custody proceeding involving an Indian child?)	Involuntary (foster-care placement and termination of parental rights)
23.112 (What time limits and extensions apply?)	Involuntary (foster-care placement and termination of parental rights)
23.113 (what are the standards for emergency proceedings involving an Indian child?)	Emergency
23.114 (what are the requirements for determining improper removal?)	Involuntary
<b>Petitions to Transfer to Tribal Court</b>	
23.115 (How are petitions for transfer of a proceeding made?)	Involuntary (foster-care placement and termination of parental rights)

### §23.104 (Cont.) What provisions apply to each type of child-custody proceeding?

Section	Type of Proceeding
23.116 (What happens after a petition for transfer is made?)	Involuntary, Voluntary (foster care placement and termination of parental rights)
23.117 (what are the criteria for ruling on transfer petitions)	Involuntary, Voluntary (foster care placement and termination of parental rights)
23.118 (How is a determination of “good cause” to deny transfer made?)	Involuntary, Voluntary (foster care placement and termination of parental rights)
23.119 (What happens after a petition for transfer is granted?)	Involuntary, Voluntary (foster care placement and termination of parental rights)

### §23.104 (Cont.) What provisions apply to each type of child-custody proceeding?

Section	Type of Proceeding
Adjudication of Involuntary Proceedings	
23.120 (How does the State court ensure active efforts have been made?)	Involuntary (foster care placement, termination of parental rights (TPR))
23.121 (What are the applicable standards of evidence?)	Involuntary (foster care placement, TPR)
23.122 (Who may serve as a qualified expert witness?)	Involuntary (foster care placement, TPR)
<b>Voluntary Proceedings</b>	
23.124 (What actions must a State court undertake in voluntary proceedings?)	Voluntary



### §23.104 (Cont.) What provisions apply to each type of child-custody proceeding?

Section	Type of Proceeding
23.125 (How is consent obtained?)	Voluntary
23.126 (What information must a consent document contain?)	Voluntary
23.127 (How is withdrawal of consent to a foster care placement achieved?)	Voluntary
23.128 (How is withdrawal of consent to a termination of parental rights or adoption achieved?)	Voluntary
<b>Dispositions</b>	
23.129 (When do the placement preferences apply?)	Involuntary, Voluntary
23.130 (What placement preferences apply in adoptive placements?)	Involuntary, Voluntary

### §23.104 (Cont.) What provisions apply to each type of child-custody proceeding?

Section	Type of Proceeding
23.131 (What placement preferences apply in foster care or pre-adoptive placements?)	Involuntary, Voluntary
23.132 (How is a determination of "good cause" to depart from the placement preferences made?)	Involuntary, Voluntary
<b>Access</b>	
23.133 (Should courts allow participation by alternative methods?)	Emergency, Involuntary
23.134 (Who has access to reports and records during a proceeding?)	Emergency, Involuntary
<b>Post Trial Rights &amp; Responsibilities</b>	
23.136 (What are requirements for vacating adoption on consent obtained through fraud or duress?)	Involuntary (if consent given under threat of removal), voluntary

## §23.104 (Cont.) What provisions apply?

Section	Type of Proceeding
23.137 (Who can petition to invalidate an action for certain ICWA violations?)	Emergency (to extent involved specified violation), Involuntary, Voluntary.
23.138 (What are the rights to information about adoptees' Tribal affiliations?)	Emergency, Involuntary, Voluntary
23.139 (Must notice be given of a change in an adopted Indian child's status?)	Involuntary, Voluntary
<b>Recordkeeping</b>	
23.140 (What information must States furnish to BIA?)	Involuntary, Voluntary
23.141 (What records must the State maintain?)	Involuntary, Voluntary
23.142 (How does Paperwork Reduction Act affect it?)	Emergency, Involuntary, Voluntary
Effective Date and Severability (23.143 and 23.144)	Emergency, Involuntary, Voluntary

## Inquiry/Notice of a Tribe

### BIA ICWA Regulation § 23.105

To provide notice or obtain info or verification, direct notice as follows:

- (a) List of Tribal Agents for service of ICWA notice found in the Federal Register or at [www.bia.gov](http://www.bia.gov) ;
- (b) For tribes without a designated agent, contact the tribe directly and ask; or
- (c) If these fail then contact the local or regional BIA office.

### CA WIC § 224.2/3, CRC 5.481

California law does not really address interaction between an agency or a court beyond the formal ICWA notice sent registered mail return receipt requested (Notice of Child Custody Proceeding for Indian Child, Form ICWA-030) and directing other inquiries to the BIA or the tribes themselves.

## Pre-Trial Requirements Section 23.107 et seq.

## Determining if there is reason to know child is an Indian child

### BIA ICWA Regulation § 23.107

- (a) New regulations require courts to ask each party to a proceeding whether s/he knows or has reason to know that child is an Indian child;
- (b) If there is reason to know but insufficient evidence courts must then:
  - (1) Confirm by report, testimony, or declaration in the record that agency used due diligence to identify and work with all tribes which there is reason to know child may be a member and verify child is a member or biological child of a member and eligible for membership; AND
  - (2) Treat the child as an Indian child unless and until it determines on the record the child does not meet definition of Indian child.

### CA WIC § 224.3

California law obligates courts and agencies/petitioners to make this inquiry;

Again, this is an example of California law imposing more stringent standard which is compatible with the ICWA;

New BIA Guidelines

## § 23.107(c): Court Determines Reason to Know Child is an Indian Child

A court, upon conducting the inquiry required in Paragraph (a), has reason to know a child involved in an emergency or child custody proceeding is an Indian child if:

- (1) Any participant in the proceeding, office of the court involving in the proceeding, Indian tribe, Indian organization, or agency informs the court that child is an Indian child;
- (2) Any participant in the proceeding, office of the court involved in the proceeding, Indian Tribe, Indian organization or agency informs the court is has discovered information;
- (3) The child who is the subject of the proceeding gives the court reason to know he or she is an Indian child;
- (4) The court is informed that the domicile or residence of the child, the child's parent, or the child's Indian custodian is on a reservation or in an Alaska Native village;
- (5) The court is informed that the child is or has been a ward of a Tribal court; or
- (6) The court is informed that either parent or the child possesses an identification card indicating membership in an Indian Tribe.

## Determination of ICWA Status

### BIA ICWA Regulation § 23.108

Only the tribe can determine if the child is a member or eligible for ICWA purposes.

- A state may not substitute its own judgment for the tribe's;
- But a state may rely on facts or documentation indicating a tribal determination of membership or eligibility for membership, such as enrollment documentation.

### CA WIC § 224.3

- A tribe's determination is conclusive under California law however information that the child is not enrolled or is not eligible for enrollment in the tribe is not determinative UNLESS the tribe confirms in writing that enrollment is a prerequisite for membership under tribal law or custom.

## Determining a Child's Tribe when there may be more than one choice

### BIA ICWA Regulation § 23.109

(b) If the child meets the definition of Indian child for more than one tribe, deference should be given to tribe in which child already a member unless otherwise agreed to by the tribes;

(c) If the child is a member of more than one tribe or eligible to be a member in more than one tribe the court must provide an opportunity in any voluntary proceeding for tribes to determine who should be designated as tribe;.....

(2) If tribes cannot agree then the state court must choose the tribe with which the child has the most significant contact, considering these factors:

- Parents' preference for membership for child;
- Length of domicile or residence on or near reservation of each tribe;
- Tribal membership of the custodial parent or Indian custodian;
- Interest asserted by each tribe;
- Whether one of the tribes previously adjudicated the child in tribal court; and
- Self identification of the child if he is of sufficient age.

### CA WIC § 224.1(e)

When a child is a member of more than one tribe or eligible to be a member of more than one tribe California law also offers a "significant contacts" test but with slightly different factors:

- Length of residence on or near the reservation of each tribe and frequency of contact with each tribe;
- The child's participation in activities of each tribe;
- The child's fluency in the language of each tribe;
- Whether there has been a previous adjudication of the child by any of the tribes' courts;
- Residence on or near one of the tribes' reservations by the child's parents, Indian custodian or extended family members;
- Tribal membership of custodial parent or Indian custodian;
- Interest asserted by each tribe in response to ICWA notice; and
- Self identification of the child.

## Notice Requirements

### BIA ICWA Regulation § 23.111

Regulation § 23.111(d)(3) requires information about "direct lineal ancestors of the child, such as grandparents," less burdensome than CA requirements;

Notice required when you "know or have reason to know" an Indian child is involved;

When identity of parents or tribe is unknown notice to BIA regional office is sufficient; not necessary to notice Secretary of Interior as under CA law.

### CA WIC § 224.2

California law goes further than the new regulations by requiring notice to include "all names known of the Indian child's biological parents, grandparents, and great-grandparents, or Indian custodians, including maiden, married and former names or aliases..."

## Emergency Proceedings

### BIA ICWA Regulation § 23.113

§ 23.113(d) requires petitions for court authorized emergency removal to include statement of risk of imminent physical damage or harm to the Indian child and any evidence that emergency removal continues to be necessary...and (3) steps taken to provide notice to child's parents, custodians and Tribe about emergency petition.

Emergency removal of an Indian child cannot last more than 30 days without the following determinations:

- Restoring the child to the parent or Indian custodian would subject him to imminent physical damage or harm;
- The court has been unable to transfer the proceeding to the jurisdiction of the appropriate tribe; or
- It has not been possible to initiate a "child custody" proceeding as defined in § 23.2.

### CA CIW §§ 305.5(f), 361.31

Section 305.5(f) does not prevent the emergency removal of an Indian child but requires it to terminate once it is no longer necessary to prevent imminent physical damage or harm to the child and initiate an Indian child custody proceeding, transfer the child to his or her tribe's jurisdiction or restore the child to the parent or Indian custodian.

§ 361.31 says the emergency removal of a child known to be or is believed to be an Indian child shall be in the least restrictive setting where his or her needs may be met and then the placement preferences should be followed.

## Improper Removal/Termination of Proceeding

### BIA ICWA Regulation § 23.114

Requirements for determining an improper removal:

- (a) If any party asserts the Indian child may have been improperly removed from his parent or Indian custodian...the court must expeditiously determine whether there has been improper removal or retention;
- (b) If the court finds improper removal or retention it must terminate the proceeding and the child must be returned immediately to his parent or Indian custodian unless doing so would subject the child to substantial and immediate danger or threat of danger.

### WIC § 305.5(e)

Where there is an improper removal of a child from his parent or Indian custodian or improper retained custody after a visit or other temporary relinquishment of custody, "the court shall decline jurisdiction over the petition and shall immediately return the child to his or her parent or Indian custodian, unless returning the child to the parent or Indian custodian would subject the child to a substantial and immediate danger or threat of danger."

## Petitions to Transfer to Tribal Court Section 23.115 et. seq.



## Petitioning for a Transfer of a Proceeding

### BIA ICWA Regulation § 23.115

- (a) Either parent, the Indian Custodian, or the Indian child's Tribe may request, at any time, orally on the record or in writing, that the State court transfer a foster-care or termination-of-parental-rights proceeding to the jurisdiction of the child's Tribe.
- (b) The right to request a transfer is available at any stage in each foster-care or termination-of-parental-rights proceeding.

### CA WIC § 305.5(b)

In the case of an Indian child who is not domiciled or residing within a reservation of an Indian tribe that does not have exclusive jurisdiction over child custody proceedings...the court shall transfer the proceeding to the jurisdiction of the child's tribe upon petition by either parent, the Indian custodian, if any, or the child's tribe, unless the court finds good cause not to transfer. The court shall dismiss the (state) proceeding or terminate jurisdiction only after receiving proof that the tribal court has accepted the transfer of jurisdiction. At that time the court dismisses the proceeding or terminates jurisdiction, the court shall also make an order transferring the physical custody of the child to the tribal court.

## What happens after a petition for transfer is made?

### BIA ICWA Regulation § 23.116

Upon receipt of a transfer petition the State court must ensure that the Tribal court is promptly notified in writing of the transfer petition. This notification may request a timely response regarding whether the Tribal court wishes to decline the transfer.

### California law

No analogous provision under California law.

## Criteria for Ruling on Transfer Petitions

### BIA ICWA Regulation § 23.117

Upon receipt of a transfer petition from an Indian child's parent, Indian custodian, or Tribe, the State court must transfer the child-custody proceeding unless the court determines that transfer is not appropriate because one or more of the following criteria are met:

- (a) Either parent objects to such a transfer;
- (b) The Tribal court declines the transfer; or
- (c) Good cause exists for denying the transfer.

### CA WIC § 305.5, CRC 5.483

Under Welfare & Institutions Code, the Court shall find good cause to deny the petition if one or more of the following circumstances are shown to exist:

- (A) One or both parents object to the transfer;
- (B) The child's Tribe does not have a "tribal court" as defined in 25 USC 1910 (can be an administrative body of tribe with authority over child welfare matters); or
- (C) The tribal court of the child's tribe declines the transfer.



## Criteria to Transfer...Continued

### CRC 5.483

Rule of Court 5.483

**(a) Mandatory transfer of case to tribal court with exclusive jurisdiction if:**

- (1) The Indian child is a ward of the tribal court; or
- (2) The Indian child is domiciled or resides within a reservation of an Indian tribe that has exclusive jurisdiction over Indian child custody proceeding under Sections 1911 or 1918 of 25 USC;

**(b) Presumptive transfer of case to tribal court with concurrent state and tribal jurisdiction**

Unless the court finds good cause under subdivision (d), the court must order transfer of a case to the tribal court of the child's tribe if the parent, the Indian custodian, or the child's tribe requests.

**(c) Documentation of request to transfer case to tribal court**

The parent, the Indian custodian, or the child's tribe may request transfer of the case orally or in writing by filing Notice of Petition and Petition to Transfer Case Involving an Indian Child to Tribal Jurisdiction (Form ICWA 050). If the request is made orally the court must document it and make it part of the record.

## Criteria to Transfer...Continued

### CRC 5.483

**(d) Cause to deny a request to transfer to tribal court with concurrent state and tribal jurisdiction**

(1) One or more of the following circumstances constitutes mandatory good cause to deny a request to transfer:

- (A) One or both of the child's parents objects to the transfer in open court or in an admissible writing for the record;
- (B) The child's tribe does not have a "tribal court" as defined in Section 1903 of the ICWA...
- (C) The tribal court of the child's tribe declines the transfer

(2) One or more of the following circumstances may constitute discretionary good cause to deny a request to transfer:

- (A) The evidence necessary to decide the case cannot be presented in the tribal court without undue hardship to the parties or the witnesses and the tribal court is unable to mitigate the hardship by making arrangements to receive and consider the evidence or testimony at a location convenient to the parties or witnesses, or by use of other means permitted in the tribal court's rules of evidence or discovery.
- (B) The proceeding was an advanced stage when the request to transfer was received and the petitioner did not make the request within a reasonable time after receiving notice of the proceeding, provided the notice complied with statutory requirements. Waiting until reunification efforts have failed and reunification services have been terminated before filing a request to transfer may not, by itself, be considered an unreasonable delay.
- (C) The Indian child is over 12 years of age and objects to the transfer; or
- (D) The parents of a child over five years of age are not available and the child has had little or no contact with his or her tribe or members of the child's tribe.

(3) If it appears that there is good cause to deny a transfer, the court must hold an evidentiary hearing on the transfer and make its findings on the record.

## How is determination of “good cause” to deny transfer made?

### BIA ICWA Regulation § 23.118

(a) If any party believes “good cause” to deny transfer exists the reasons must be state orally on the record or provided in writing on the record and to the parties to the child custody proceeding.

(b) Any party to the proceeding must have the opportunity to provide the court with view regarding whether good cause to deny the transfer exists.

(c) In determining whether good cause exists, the court must not consider:

- (1) Whether the foster care or termination of parental rights proceeding is at an advanced stage if the Indian child’s parent, Indian custodian or tribe did not receive notice of the proceeding until an advanced stage;
  - (2) Whether there have been prior proceedings involving the child for which no petition to transfer was filed;
  - (3) Whether transfer could affect the placement of the child;
  - (4) The Indian child’s cultural connections with the tribe or its reservation; or
  - (5) Socioeconomic conditions or any negative perception of Tribal or BIA social services or judicial systems.
- (d) The basis for any State court decision to deny transfer should be stated orally on the record or in a written order.

### WIC § 305.5(c), CRC 5.483

(2) Good cause not to transfer may exist if:

- (A) The evidence necessary to decide the case cannot be present in tribal court without undue hardship to the parties or witnesses, and the tribal court is unable to mitigate the hardship by making arrangements to receive and consider the evidence or testimony by use of remote communication, hearing evidence at a location convenient for parties and witnesses, or by use of other means.
  - (B) The proceeding was at an advanced stage when the petition transfer was received and the petitioner did not file the petition within a reasonable time after receiving notice. It shall not be unreasonable delay for a party to wait until reunification efforts have failed and reunification services have been terminated before filing a petition.
  - (C) The Indian child is over age 12 and objects to the transfer.
  - (D) The parents of a child over 5 are not available and the child has had little or no contact with the child’s tribe or members of the tribe.
- (3) Socioeconomic conditions and the perceived adequacy of social services or judicial systems may not be considered in a good cause determination.
- (4) The burden of establishing good cause to deny the transfer shall be on the party opposing the transfer. If the court believes or any party asserts good cause to the contrary exists it shall be stated in writing and made available to all parties petitioning for the transfer and the petitioner shall have an opportunity to provide information or evidence in rebuttal.

## Determination of Good Cause (Continued)



### CRC 5.483

(e) Evidentiary Considerations

The court may not consider socioeconomic conditions and the perceived adequacy of tribal social services, tribal probation, or the tribal judicial systems in its determination that good cause exists to deny the transfer.

(f) Evidentiary Burdens

- (1) The burden of establishing good cause to deny a request to transfer is on the party opposing the transfer.
- (2) If the court believes or any party asserts that good cause to deny the request exists the reasons for that belief must be stated in writing, in advance of the hearing and made available to all parties who are requesting the transfer, and the petitioner must have the opportunity to provide information or evidence in rebuttal of the belief or assertion.

## Adjudication of Involuntary Proceedings Section 23.120, et seq.

### How does the state court ensure **active efforts** have been made?

#### BIA ICWA § 23.120

- (a) Prior to ordering an involuntary foster-care placement or termination of parental rights, the court must conclude that **active efforts** have been made to prevent the breakup of the Indian family and that those efforts have been unsuccessful.
- (b) **Active efforts** must be documented in detail in the record.

#### WIC § 361

The Court shall make a determination as to whether reasonable efforts were made to prevent or to eliminate the need for removal of the minor from his home or, if the minor, is removed for one of the reasons stated in paragraph (5) of subdivision (c), whether it was reasonable under the circumstances not to make any of those efforts, or in the case of an Indian child custody proceeding, whether **active efforts** as required in § 361.7 were made and that these efforts have proved unsuccessful. The court shall state the facts on which the decision to remove the minor is based.

## How does the state court ensure **active efforts** have been made? (Continued)

### WIC § 361.7



- (a) Notwithstanding Section 361.5, a party seeking an involuntary foster care placement of, or termination of parental rights over, an Indian child shall provide evidence to the court that **active efforts** have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.
- (b) What constitutes **active efforts** shall be assessed on a case by case basis. The **active efforts** shall be made in a manner that takes into account the prevailing social and cultural values, conditions and way of life of the Indian child's tribe. **Active efforts** shall utilize the available resources of the Indian child's extended family, tribe, tribal and other Indian social service agencies and individual Indian caregiver service providers.
- (c) No foster care placement or guardianship may be ordered in the proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of a qualified expert witness, as defined in Section 224.6, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

## What are the applicable standards of evidence?

### BIA ICWA Regulation § 23.121

- (a) The court must not order a foster care placement of an Indian child unless clear and convincing evidence is presented, including the testimony of one or more qualified expert witnesses, demonstrating 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.
- (b) The court must not order a termination of parental rights for an Indian child unless evidence **beyond a reasonable doubt** is presented, including the testimony of one or more qualified expert witnesses, demonstrating 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.
- (c) For a foster care placement or termination of parental rights, 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.
- (d) Without a causal relationship identified in paragraph (c) of this section, 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 constitute clear and convincing evidence or evidence beyond a reasonable doubt that continued custody is likely to result in serious emotional or physical damage to the child.

### CA WIC § 361.7(c)

- (c) No foster care placement or guardianship may be ordered in the proceeding in the absence of a determination, supported by **clear and convincing evidence**, including testimony of a qualified expert witness, as defined in Section 224.6, that **the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.**

## BIA ICWA Regulation § 23.121(d)

Very important section: without “causal relationship” described in subsection (c), evidence of any of the below does not by itself constitute clear and convincing evidence or evidence beyond a reasonable doubt that continued custody is likely to result in serious emotional or physical damage to the child:

- Poverty;
- Isolation;
- Single parenthood;
- Crowded or inadequate housing;
- Substance abuse;
- Non conforming social behavior;

## Discussion Topic: Weighing the Evidence

Have you worked on cases, or know of cases, where removal seemed to be based on one of these factors (such as poverty, inadequate housing, substance abuse, etc.) that was not causally related to the condition in the home and possibility of emotional or physical damage to the child?

## Who can be a Qualified Expert Witness (QEW) under the BIA Regs?

### BIA ICWA Regulation § 23.122

- (a) A QEW 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 and 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 Indian child's tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's tribe.
- (b) The court or any party may request the assistance of the Indian child's tribe or the BIA office serving the Indian child's tribe in locating persons qualified to serve as expert witnesses.
- (c) The social worker regularly assigned to the Indian child may not serve as a qualified expert witness in child custody proceedings concerning the child.

## Who can be a Qualified Expert Witness (QEW) under California law? (Part 1)

### CA WIC § 361.7

#### WIC § 361.7(c)

No foster care placement or guardianship may be ordered in the absence of a determination, supported by clear and convincing evidence, including testimony of a qualified expert witness, as defined in Section 224.6, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Unlike the Regulations, California law provides examples of who might serve as a Qualified Expert Witness.

## Who can be a Qualified Expert Witness (QEW) under California law? (Part 2)

### CA WIC § 224.6

#### WIC § 224.6

- (a) When testimony of a qualified expert witness is required in an Indian child custody proceeding, a qualified expert witness may include but is not limited to, a social worker, sociologist, physician, psychologist, traditional tribal therapist and healer, tribal spiritual leader, tribal historian, or tribal elder, provided the individual is not an employee of the person or agency recommending foster care placement or termination of parental rights.
- (b) In considering whether to involuntarily place an Indian child in foster care or to terminate parental rights of the parent of an Indian child, the Court shall:
- (1) Require that a qualified expert witness testify regarding whether continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.
  - (2) Consider evidence concerning the prevailing social and cultural standards of the Indian child's tribe, including that tribe's family organization and child-rearing practices.
- (c) Persons with the following characteristics are most likely to meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings:
- (1) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.
  - (2) Any expert witness having substantial experience in the delivery of child and family services to Indians and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.
  - (3) A professional person having substantial education and experience in the area of his or her specialty.
- (d) The court or any party may request the assistance of the Indian child's tribe or Bureau of Indian Affairs agency serving the Indian child's tribe in locating persons qualified to serve as expert witnesses.
- (e) The court may accept a declaration or affidavit from a qualified expert witness in lieu of testimony only if the parties have so stipulated in writing and the court is satisfied the stipulation is made knowingly, intelligently and voluntarily.

### Discussion Topic:

#### An opportunity to choose an expert

All tribes are different with unique cultures, languages, approaches to government, economic development and Indian child welfare. There are different ways to address the QEW requirement:

- What outcome does the Tribe desire?
- Who knows the tribe better than its members?
- Should tribes use this opportunity to offer input or put the responsibility back on the County?

## Voluntary Proceedings Section 23.124 et seq.

## Voluntary Proceedings

### BIA ICWA Regulation § 23.124

- (a) The State Court must require participants in a voluntary proceeding to state on the record whether the child is an Indian child or whether there is reason to believe s/he is... (See 23.107)
- (b) If there is reason to believe the child is an Indian child the State court must ensure the party seeking placement has taken all reasonable steps to verify the Indian child's status. This may include contacting the Tribe to verify it. Where a requesting parent requests anonymity a Tribe receiving information must keep relevant information confidential.
- (c) Placement of the Indian child must comply with §§ 23.129 – 23.132

### CA Law

California does not have an analogous provision. If a parent or Indian custodian retains the right to have the child returned on demand the proceeding would not fall under the meaning of “**Indian Child Custody Proceeding.**”



## Obtaining Parental Consent

### BIA ICWA Regulation § 23.125

- (a) Parental or Indian custodian consent to voluntary termination of parental rights, foster care, pre-adoptive or adoptive placement must be executed in writing and recorded before a court of competent jurisdiction.
- (b) Before accepting consent the Court must advise parent/Indian custodian:
- (1) Terms and consequences of consent;
  - (2) Limitations on withdrawal of consent;
  - (3) Certify terms and consequences explained to parent/Indian custodian on record in English or his/her primary language and were fully understood;
  - (4) Consent does not need to be in open session of court when confidentiality is requested but still must be before a court of competent jurisdiction.
  - (5) Consent given prior to, or within 10 days after, the birth of Indian child not valid.

### CA Law

#### WIC 16507.4(b)

- Consent must be in writing at least 10 days after child's birth
- Judge certifies terms and consequences explained and understood
- Parent or Indian custodian may withdraw consent at any time for any reason and child is returned

#### Family Code § 8606.5

- Identical to WIC 16507.4(b) except consent must be withdrawn before entry/final adoption decree

#### Probate Code § 1500.1

- Identical to WIC 16507.4(b) except consent must be withdrawn before issuance of guardianship letters

## Information in Consent Document

### BIA ICWA Regulation § 23.126

- (a) Conditions of consent, if any;
- (b) In addition to conditions, if any, written consent for foster care must include:
- (1) Child's name & birthdate;
  - (2) Name of child's Tribe;
  - (3) Tribal enrollment number of parent & child, if known
  - (4) Name, address and other identifying information (??) of consenting parent or Indian custodian;
  - (5) Name & address of person or entity who arranged the placement
  - (6) Name & address of prospective foster parents if known

### CA Law

No analogous provision under California.

## Withdrawal of Consent to Foster Care

### BIA ICWA Regulation § 23.127

- (a) Parent or Indian custodian may withdraw consent to voluntary foster care at any time.
- (b) S/he withdraws consent by filing a written document with court or testifying before it (other methods may be available under State law).
- (c) When a parent or Indian custodian withdraws consent court must ensure child is returned to that parent or Indian custodian as soon as practicable.

### CA Law

Again, California law does not have an equivalent provision.

## Withdrawing Consent in Termination of Parental Rights or Adoption cases

### BIA ICWA Regulation § 23.128

- (a) Parent may withdraw consent to voluntary termination of parental rights any time before entry of final decree of termination.
- (b) Parent or Indian custodian may withdraw consent to voluntary adoption any time before entry of final decree.
- (c) To withdraw consent prior to entry of final decree of adoption parent or Indian custodian must file written document with court or testify.
- (d) Court where withdrawal of consent is filed must promptly notify the person or entity who arranged any voluntary pre-adoptive or adoptive placement and return the child as soon as practicable.

### CA Law

No equivalent provision under CA law.

## Dispositions

### Section 23.129 et seq.

## When Do Placement Preferences Apply?

### BIA ICWA Regulation § 23.129

- (a) Placement preferences in §§ 23.130 and 23.131 apply to any pre-adoptive, adoptive or foster care placements;
- (b) When consent parent requests anonymity in a voluntary proceeding court must give weight to request in applying preferences;
- (c) Placement preferences must be applied in any foster care, pre-adoptive or adoptive placement unless good cause exists under § 23.132.

### CA Law

WIC 361.31 (d): notwithstanding placement preferences in (b) and (c), if a different placement order is established by the child's Tribe the court or agency effecting the placement the placement shall follow the preference established by the tribe so long as its the least restrictive setting and appropriate to the child's particular needs.

(e) When of sufficient age the placement preference of the child shall be considered.

## Placement Preferences in Adoptive Proceedings

### BIA ICWA Regulation § 23.130

- (a) In adoptive placements under State law where the Tribe has not established a different order of preference, preference must be given in descending order, as listed below:
- (1) A member of the Indian child's extended family;
  - (2) Other members of the Indian child's Tribe;
  - (3) Other Indian families;
- (b) If the Indian child's Tribe established by resolution a different order of preference, its placement preferences apply;
- (c) The court must (where appropriate) consider the placement preference of the Indian child or his/her parent.

### CA Law

WIC 361.31 (c) says preference shall be given to a placement with one of the following in descending priority order:

- (1) A member of the Indian child's extended family;
- (2) Other members of the child's tribe;
- (3) Another Indian family.

Basically a very similar order, different wording.

## Placement Preferences in Foster Care or Pre-Adoptive Placements

### BIA ICWA Regulation § 23.131

- (a) Child must be placed in least restrictive setting that:
- (1) Most approximates a family, taking into account sibling attachment;
  - (2) Allows Indian child's special needs (if any) to be met;
  - (3) Is in reasonable proximity to Indian child's home, extended family or siblings;
- (b) Preference must be given, in descending order as listed below:
- (1) A member of child's extended family;
  - (2) A foster home licensed, approved or specified by the Tribe;
  - (3) An Indian foster home licensed or approved by an authorized non-Indian licensing authority;
  - (4) Institution for children approved by a Tribe or operated by an Indian organization who is suitable for child's needs.
- Again, if Tribe has a different preference order that applies and consider child's preference.

### CA Law

WIC 361.31 (b) says the following for foster care or guardianship placement:

- Least restrictive setting which most approximates a family situation and in which child's special needs (if any) are met.
- Child placed within reasonable proximity to the child's home.
- Preference shall be given to one of the following in descending order:
  - A member of the child's extended family;
  - A foster home licensed, approved or specified by the Indian child's Tribe;
  - An Indian foster home licensed and authorized non-Indian licensing authority;
  - An institution for children approved by an Indian tribe or operated by an Indian organization suitable to meet the child's needs (if any).

## How “Good Cause” Determination to Depart from Placement Preferences made (Part 1)

### BIA ICWA Regulation §23.132

- (a) Any party asserting good cause exists to not follow the placement preferences must state the reasons orally on the record or provided in writing to the parties and the court.
- (b) Party seeking to deviate from placement preferences bears burden of proving by “clear and convincing evidence” that good cause exists to deviate;

### CA Law

WIC 361.31

(h) - Court may find good cause exists not to follow placement preferences

(i) - When no preferred placement is available active efforts shall be made to place the child with a family committed to enabling him or her to have visitation and participation in cultural and ceremonial events of his or her Tribe.

(j) – Burden of establishing good cause is on party requesting placement preferences not be followed.

## How “Good Cause” Determination to Depart from Placement Preferences made (Part 2)

### BIA ICWA Regulation § 23.132

(c) A court’s determination of good cause must be made on the record or in writing and should be based on one or more of the following considerations:

- (1) Request of one or both parents if they attest they have reviewed the placement options;
- (2) Request of the child if s/he is of **sufficient age** and capacity to understand the decision;
- (3) **Presence of sibling attachment that can only be maintained through a particular placement;**
- (4) The extraordinary physical, mental or emotional needs of the child (such as specialized services) that would not be available in the community where a preferred placement lives;
- (5) The unavailability of a suitable placement after a diligent search was conducted and concluded none has been located.

### CA Law

CRC 5.484 (b) refers to the Placement Preferences in WIC 361.31 and analogous Family and Probate Code provisions.

Deviating from the preferences order may be done for good cause which may include these considerations:

- Request of parent/Indian custodian
- Request of Indian child (of **sufficient age**)
- Extraordinary physical or emotional needs of Indian child **as established by QEW**; or
- Unavailability of suitable families based on documented diligent effort

## How “Good Cause” Determination to Depart from Placement Preferences made (Part 3)

### BIA ICWA Regulation §23.132

- (d) A placement may not depart from the preferences based on **socioeconomic status** of any placement relative to another placement.
- (e) 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 made in violation of the ICWA.

### CA Law

Limitation on considering socioeconomic status is not present in California law, as is the limitation on considering bonding which occurs while a child is in a non-compliant placement.

## Participation by Alternative Methods

### BIA ICWA Regulation § 23.133

If it possesses the capability, the court should allow alternative methods of participation in State-court child custody proceedings involving an Indian child, such as participation by telephone, videoconferencing, or other methods.

### CA Law

California law does not contain an analogous provision although it probably should given the number of tribes across the U.S. and how vastly different their resources.

## Discussion Topic:

### Why is Participation by Alternative Methods Important for Tribes?

- Distance makes in-person appearances difficult;
- Tribes vary widely in their budgets, staff size and other resources;
- Many tribes have a vested interest in proceedings involving their youngest members (and future leaders).
- Courts and other parties should accommodate them to ensure Tribal participation.

## Access to Records

### BIA ICWA Regulation § 23.134

Each party to an emergency proceeding or a foster-care-placement or termination of parental rights proceeding under State law 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 with respect to such action may be based.

### CA Dependency Law

Section 2.109[12] of Dependency Proceedings notes that counsel in dependency proceeding must be given access to all records relevant to the case that are maintained by state and local public agencies. There is no required timeline but documents should be produced within thirty days. California Evidence Code § 1158 addresses authority to access medical records.

## Why is Access to Records Important in ICWA Proceedings?

All parties need information – petitions detailing the allegations, status reports containing progress with case plans and recommendations – to make informed decisions.

Tribes are often the last party to enter a case due to notice, which puts them at a disadvantage; in many cases they must intervene, obtain a court order granting the intervention, before obtaining access to documents.

## Vacating Adoption Based on Consent Obtained through Fraud or Duress

### BIA ICWA Regulation § 23.136

- (a) Within two years of adoption decree of an Indian child by a State court (or longer if allowed under state law), the State may invalidate the voluntary adoption on finding the parent's consent was obtained by fraud or duress.
- (b) Upon the parent's filing of a petition to invalidate the final decree of adoption of the parent's Indian child, the court must give notice to all parties to the adoption proceedings and the Indian child's tribe and must hold a hearing on the petition.
- (c) Where the court finds that parent's consent was obtained through fraud or duress, the court must vacate the final decree of adoption, order the consent revoked, and order that the child be returned to the parent.

### CA Family Code § 8606.5

Subsection (c) allows the parent of an Indian child to withdraw consent to the adoption on the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon finding that consent was obtained through fraud or duress the court shall vacate the decree and return the child (provided no adoption has been effective for at least two years may be invalidated unless otherwise permitted under state law).



## Differences between ICWA Regulation § 23.136 & State Law?

Section 23.136 requires that notice be given to all parties to the adoption proceedings and the Indian child's tribe;

Section 23.136 further requires a hearing be held on the petition (which is probably implied in the Family Code section, but not stated specifically).

## Petitions to Invalidate for ICWA Violations

### BIA ICWA Regulation § 23.137

(a) The following parties can petition to invalidate an action for foster care placement or termination of parental rights for ICWA violations.

- (1) An Indian child subject of the action;
- (2) A parent or Indian custodian from whom the child was removed;
- (3) The Indian child's tribe.

(b) The court must determine if it is appropriate to invalidate;

(c) There is no requirement that the person petitioning to invalidate had his or her rights violated; he or she may challenge the action based on any violation of 25 U.S.C. 1911, 1912 or 1913 during the course of the proceeding.

### CA Law

Family Code § 175 (e) permits the same parties listed in Reg § 23.137 to petition to invalidate the Indian child custody proceeding for foster care, guardianship placement, or termination of parental rights.

Probate Code §1459 (e) contains language almost identical to the Family Code.

WIC § 224 (e) contains the same language as that the Probate Code section above.

## Adoptees' Right to Tribal Affiliation Information

### BIA ICWA Regulation § 23.138

Upon application by an Indian who has reached age 18 who was the subject of an adoptive placement, the court that entered the final decree of adoption must inform such individual of the Tribal affiliations, if any, of the individual's biological parents and provide such other information necessary to protect any rights, which may include Tribal membership, resulting from the individual's Tribal relationship.

### CA Law

California Family Code § 9209(a) contains language very similar to § 23.138.

California Health and Safety Code § 102705 allows all information to be available upon order of the court of the county of residence of the petitioner or the court that granted the order of adoption.

## Effective Date - § 23.143

None of the provisions of this subpart affects a proceeding under State law for foster-care placement, termination of parental rights, pre-adoptive placement, or adoptive placement that was initiated prior to **December 12, 2016**, but the provisions of this subpart apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

## Evaluations

Please take the next ten minutes to complete the evaluation form included in your handouts. This form will help us to improve our trainings and provide useful feedback that will assist us in the development of future trainings.

## For Further Information re Regulations and/or Guidelines

See BIA web site:

<https://www.indianaffairs.gov/WhoWeAre/BIA/OIS/HumanServices/IndianChildWelfareAct>

See CILS web site: [www.calindian.org](http://www.calindian.org)

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# BIA ICWA REGULATIONS QUIZ

Presented by Mark Vezzola – CILS Directing Attorney, Escondido  
Jasmine Andreas – CILS Directing Attorney, Bishop

1. Of the following choices, who would likely not meet the definition of an “Indian child”?
  - a. A boy who is enrolled with the tribe but who never visited its reservation.
  - b. A girl with 0.50% Cherokee blood who is enrolled in the tribe, as is one of her parents.
  - c. A child who is a lineal descendant of a tribe and considered eligible by the tribe.
  - d. A child whose father is an enrolled member of the tribe but who does not otherwise meet the eligibility criteria.
  
2. True or False: A state court’s belief that the tribal court might change the child’s placement constitutes “good cause” to deny a request to transfer jurisdiction under the new BIA ICWA Regulations.
  - a. True.
  - b. False.
  
3. The non-Native father in a dependency case makes a verbal objection to his child’s Tribe’s request to transfer jurisdiction. What result?
  - a. It depends on whether the Court finds good cause to deny the request.
  - b. The request will be denied.
  - c. The request will be granted if the Native mother agrees.
  - d. The request will be denied because father’s objection was not in writing.
  
4. True or False: The new BIA ICWA Regulations can only be applied to cases initiated since December 12, 2016, but not those that started before that date.
  - a. True.
  - b. False.
  
5. True or False: Evidence of a crowded home can be considered clearly convincing evidence of serious emotional or physical damage to a change under the new BIA Regulations.
  - a. True.
  - b. False.



**ELECTRONIC CODE OF FEDERAL REGULATIONS**

**e-CFR data is current as of February 24, 2017**

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**Title 25: Indians**

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**PART 23—INDIAN CHILD WELFARE ACT**

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AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2, 9, 1901-1952.

SOURCE: 59 FR 2256, Jan. 13, 1994, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 23 appear at 79 FR 27190, May 13, 2014.

## Subpart A—Purpose, Definitions, and Policy

### §23.1 Purpose.

The purpose of the regulations in this part is to govern the provision of funding for, and the administration of Indian child and family service programs as authorized by the Indian Child Welfare Act of 1978 (Pub. L. 95-608, 92 Stat. 3069, 25 U.S.C. 2, 9, 1901-1952).

### §23.2 Definitions.

*Act* means the Indian Child Welfare Act (ICWA), Pub. L. 95-608, 92 Stat. 3069, 25 U.S.C. 1901 *et seq.*

*Active efforts* means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan. To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and Tribe. Active efforts are to be tailored to the facts and circumstances of the case and may include, for example:

- (1) Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal;
- (2) Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;
- (3) Identifying, notifying, and inviting representatives of the Indian child's Tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning, and resolution of placement issues;
- (4) Conducting or causing to be conducted a diligent search for the Indian child's extended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child's parents;
- (5) Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's Tribe;

- (6) Taking steps to keep siblings together whenever possible;
- (7) Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;
- (8) Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources;
- (9) Monitoring progress and participation in services;
- (10) Considering alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available;
- (11) Providing post-reunification services and monitoring.

**Assistant Secretary** means the Assistant Secretary—Indian Affairs, the Department of the Interior.

**Bureau of Indian Affairs (BIA)** means the Bureau of Indian Affairs, the Department of the Interior.

***Child-custody proceeding.***

- (1) “Child-custody proceeding” means and includes any action, other than an emergency proceeding, that may culminate in one of the following outcomes:
  - (i) Foster-care placement, which is any action removing an Indian child from his or her parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;
  - (ii) Termination of parental rights, which is any action resulting in the termination of the parent-child relationship;
  - (iii) Preadoptive placement, which is the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; or
  - (iv) Adoptive placement, which is the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.
- (2) An action that may culminate in one of these four outcomes is considered a separate child-custody proceeding from an action that may culminate in a different one of these four outcomes. There may be several child-custody proceedings involving any given Indian child. Within each child-custody proceeding, there may be several hearings. If a child is placed in foster care or another out-of-home placement as a result of a status offense, that status offense proceeding is a child-custody proceeding.

**Consortium** means an association or partnership of two or more eligible applicants who enter into an agreement to administer a grant program and to provide services under the grant to Indian residents in a specific geographical area when it is administratively feasible to provide an adequate level of services within the area.

**Continued custody** means physical custody or legal custody or both, under any applicable Tribal law or Tribal custom or State law, that a parent or Indian custodian already has or had at any point in the past. The biological mother of a child has had custody of a child.

**Custody** means physical custody or legal custody or both, under any applicable Tribal law or Tribal custom or State law. A party may demonstrate the existence of custody by looking to Tribal law or Tribal custom or State law.

**Domicile** means:

- (1) For a parent or Indian custodian, the place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain indefinitely even though the person may be currently residing elsewhere.
- (2) For an Indian child, the domicile of the Indian child's parents or Indian custodian or guardian. In the case of an Indian child whose parents are not married to each other, the domicile of the Indian child's custodial parent.

**Emergency proceeding** means and includes any court action that involves an emergency removal or emergency placement of an Indian child.

**Extended family member** is defined by the law or custom of the Indian child's Tribe or, in the absence of such law or custom, is a person who has reached age 18 and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.

**Grant** means a written agreement between the BIA and the governing body of an Indian tribe or Indian organization wherein the BIA provides funds to the grantee to plan, conduct or administer specific programs, services, or activities and where the administrative and programmatic provisions are specifically delineated.

**Grantee** means the tribal governing body of an Indian tribe or Board of Directors of an Indian organization responsible for grant administration.

**Grants officer** means an officially designated officer who administers ICWA grants awarded by the Bureau of Indian Affairs, the Department of the Interior.

**Hearing** means a judicial session held for the purpose of deciding issues of fact, of law, or both.

**Indian** means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 7 of the Alaska Native Claims Settlement Act, 43 U.S.C. 1606.

**Indian child** means any unmarried person who is under age 18 and either:

- (1) Is a member or citizen of an Indian Tribe; or
- (2) Is eligible for membership or citizenship in an Indian Tribe and is the biological child of a member/citizen of an Indian Tribe.

**Indian child's Tribe** means:

- (1) The Indian Tribe in which an Indian child is a member or eligible for membership; or
- (2) In the case of an Indian child who is a member of or eligible for membership in more than one Tribe, the Indian Tribe described in §23.109.

**Indian custodian** means any Indian who has legal custody of an Indian child under applicable Tribal law or custom or under applicable State law, or to whom temporary physical

care, custody, and control has been transferred by the parent of such child. An Indian may demonstrate that he or she is an Indian custodian by looking to Tribal law or Tribal custom or State law.

**Indian foster home** means a foster home where one or more of the licensed or approved foster parents is an “Indian” as defined in 25 U.S.C. 1903(3).

**Indian organization**, solely for purposes of eligibility for grants under subpart D of this part, means any legally established group, association, partnership, corporation, or other legal entity which is owned or controlled by Indians, or a majority (51 percent or more) of whose members are Indians.

**Indian preference** means preference and opportunities for employment and training provided to Indians in the administration of grants in accordance with section 7 (b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450).

**Indian tribe** means any Indian tribe, band, nation, or other organized group or community of Indians federally recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 3 (c) of the Alaska Native Claims Settlement Act, 43 U.S.C. 1602 (c).

**Involuntary proceeding** means a child-custody proceeding in which the parent does not consent of his or her free will to the foster-care, preadoptive, or adoptive placement or termination of parental rights or in which the parent consents to the foster-care, preadoptive, or adoptive placement under threat of removal of the child by a State court or agency.

**Off-reservation ICWA program** means an ICWA program administered in accordance with 25 U.S.C. 1932 by an off-reservation Indian organization.

**Parent** or **parents** means any biological parent or parents of an Indian child, or any Indian who has lawfully adopted an Indian child, including adoptions under Tribal law or custom. It does not include an unwed biological father where paternity has not been acknowledged or established.

**Reservation** means Indian country as defined in 18 U.S.C 1151 and any lands, not covered under that section, title to which is held by the United States in trust for the benefit of any Indian Tribe or individual or held by any Indian Tribe or individual subject to a restriction by the United States against alienation.

**Secretary** means the Secretary of the Interior or the Secretary's authorized representative acting under delegated authority.

**Service areas solely for newly recognized or restored Indian tribes without established reservations** means those service areas congressionally established by Federal law to be the equivalent of a reservation for the purpose of determining the eligibility of a newly recognized or restored Indian tribe and its members for all Federal services and benefits.

**State court** means any agent or agency of a state, including the District of Columbia or any territory or possession of the United States, or any political subdivision empowered by law to terminate parental rights or to make foster care placements, preadoptive placements, or adoptive placements.

**Status offenses** mean offenses that would not be considered criminal if committed by an adult; they are acts prohibited only because of a person's status as a minor (*e.g.*, truancy, incorrigibility).

**Subgrant** means a secondary grant that undertakes part of the obligations of the primary grant, and assumes the legal and financial responsibility for the funds awarded and for the performance of the grant-supported activity.

**Technical assistance** means the provision of oral, written, or other relevant information and assistance to prospective grant applicants in the development of their grant proposals. Technical assistance may include a preliminary review of an application to assist the applicant in identifying the strengths and weaknesses of the proposal, ongoing program planning, design and evaluation, and such other program-specific assistance as is necessary for ongoing grant administration and management.

**Title II** means title II of Public Law 95-608, the Indian Child Welfare Act of 1978, which authorizes the Secretary to make grants to Indian tribes and off-reservation Indian organizations for the establishment and operation of Indian child and family service programs.

**Tribal court** means a court with jurisdiction over child-custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian Tribe, or any other administrative body of a Tribe vested with authority over child-custody proceedings.

**Tribal government** means the federally recognized governing body of an Indian tribe.

**Upon demand** means that the parent or Indian custodian can regain custody simply upon verbal request, without any formalities or contingencies.

**Value** means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

**Voluntary proceeding** means a child-custody proceeding that is not an involuntary proceeding, such as a proceeding for foster-care, preadoptive, or adoptive placement that either parent, both parents, or the Indian custodian has, of his or her or their free will, without a threat of removal by a State agency, consented to for the Indian child, or a proceeding for voluntary termination of parental rights.

[59 FR 2256, Jan. 13, 1994, as amended at 81 FR 38864, June 14, 2016]

### **§23.3 Policy.**

In enacting the Indian Child Welfare Act of 1978, Pub. L. 95-608, the Congress has declared 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 Indian families by the establishment of minimum Federal standards to prevent the arbitrary removal of Indian children from their families and tribes and to ensure that measures which prevent the breakup of Indian families are followed in child custody proceedings (25 U.S.C. 1902). Indian child and family service programs receiving title II funds and operated by federally recognized Indian tribes and off-reservation Indian organizations shall reflect the unique values of Indian culture and promote the stability and security of Indian children, Indian families and Indian communities. It is the policy of the Bureau of Indian Affairs to emphasize and facilitate the comprehensive design, development and implementation of Indian child and family service programs in coordination with other Federal, state, local, and tribal programs which strengthen and preserve Indian families and Indian tribes.

### **§23.4 Information collection.**

(a) The information collection requirements contained in §23.13 of this part have been approved by the Office of Management and Budget (OMB) under 44 U.S.C. 3501 *et seq.*, and assigned clearance number 1076-0111.

- (1) This information will be used to determine eligibility for payment of legal fees for indigent Indian parents and Indian custodians, involved in involuntary Indian child custody proceedings in state courts, who are not eligible for legal services through other mechanisms. Response to this request is required to obtain a benefit.
- (2) Public reporting for this information collection is estimated to average 10 hours per response, including the time for reviewing instructions, gathering and maintaining data, and completing and reviewing the information collection. Direct comments regarding the burden estimate or any aspect of this information collection should be mailed or hand-delivered to the Bureau of Indian Affairs, Information Collection Clearance Officer, Room 336-SIB, 1849 C Street, NW., Washington, DC 20240; and the Office of Information and Regulatory Affairs Paperwork Reduction Project—1076-0111, Office of Management and Budget, Washington, DC 20503.

(b) The information collection requirements contained in §§23.21; 23.31; 23.46; 23.47, and 23.71 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1076-0131. The information collection requirements under §§23.21 and 23.31 are collected in the form of ICWA grant applications from Indian tribes and off-reservation Indian organizations. A response to this request is required to obtain grant funds. The information collection requirements under §23.46 are collected in compliance with applicable OMB circulars on financial management, internal and external controls and other fiscal assurances in accordance with existing Federal grant administration and reporting requirements. The grantee information collection requirements under §23.47 are collected in the form of quarterly and annual program performance narrative reports and statistical data as required by the grant award document. Pursuant to 25 U.S.C. 1951, the information collection requirement under §23.71 is collected from state courts entering final adoption decrees for any Indian child and is provided to and maintained by the Secretary.

- (1) Public reporting for the information collection at §§23.21 and 23.31 is estimated to average 32 hours per response, including the time for reviewing the grant application instructions, gathering the necessary information and data, and completing the grant application. Public reporting for the information collection at §§23.46 and 23.47 is estimated to average a combined total of 16 annual hours per grantee, including the time for gathering the necessary information and data, and completing the required forms and reports. Public reporting for the information collection at §23.71 is estimated to average 4 hours per response, including the time for obtaining and preparing the final adoption decree for transmittal to the Secretary.
- (2) Direct comments regarding any of these burden estimates or any aspect of these information collection requirements should be mailed or hand-delivered to the Bureau of Indian Affairs, Information Collection Clearance Officer, room 336-SIB, 1849 C Street, NW., Washington, DC, 20240; and the Office of Information

## **Subpart B—Notice of Involuntary Child Custody Proceedings and Payment for Appointed Counsel in State Courts**

### **§23.11 Notice.**

(a) 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 must include the requisite information identified in §23.111, consistent with the confidentiality requirement in §23.111(d)(6)(ix). Copies of these notices must be sent to the appropriate Regional Director listed in paragraphs (b)(1) through (12) of this section by registered or certified mail with return receipt requested or by personal delivery and must include the information required by §23.111.

(b)

- (1) For child-custody proceedings in Alabama, Connecticut, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia, or any territory or possession of the United States, notices must be sent to the following address: Eastern Regional Director, Bureau of Indian Affairs, 545 Marriott Drive, Suite 700, Nashville, Tennessee 37214.
- (2) For child-custody proceedings in Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio, or Wisconsin, notices must be sent to the following address: Minneapolis Regional Director, Bureau of Indian Affairs, 331 Second Avenue South, Minneapolis, Minnesota 55401-2241.
- (3) For child-custody proceedings in Nebraska, North Dakota, or South Dakota, notices must be sent to the following address: Aberdeen Regional Director, Bureau of Indian Affairs, 115 Fourth Avenue SE., Aberdeen, South Dakota 57401.
- (4) For child-custody proceedings in Kansas, Texas (except for notices to the Ysleta del Sur Pueblo of El Paso County, Texas), or the western Oklahoma counties of Alfalfa, Beaver, Beckman, Blaine, Caddo, Canadian, Cimarron, Cleveland, Comanche, Cotton, Custer, Dewey, Ellis, Garfield, Grant, Greer, Harmon, Harper, Jackson, Kay, Kingfisher, Kiowa, Lincoln, Logan, Major, Noble, Oklahoma, Pawnee, Payne, Pottawatomie, Roger Mills, Texas, Tillman, Washita, Woods or Woodward, notices must be sent to the following address: Anadarko Regional Director, Bureau of Indian Affairs, P.O. Box 368, Anadarko, Oklahoma 73005. Notices to the Ysleta del Sur Pueblo must be sent to the Albuquerque Regional Director at the address listed in paragraph (b)(6) of this section.



- (5) For child-custody proceedings in Wyoming or Montana (except for notices to the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana), notices must be sent to the following address: Billings Regional Director, Bureau of Indian Affairs, 316 N. 26th Street, Billings, Montana 59101. Notices to the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, must be sent to the Portland Regional Director at the address listed in paragraph (b)(11) of this section.
- (6) For child-custody proceedings in the Texas counties of El Paso and Hudspeth or in Colorado or New Mexico (exclusive of notices to the Navajo Nation from the New Mexico counties listed in paragraph (b)(9) of this section), notices must be sent to the following address: Albuquerque Regional Director, Bureau of Indian Affairs, 615 First Street, P.O. Box 26567, Albuquerque, New Mexico 87125. Notices to the Navajo Nation must be sent to the Navajo Regional Director at the address listed in paragraph (b)(9) of this section.
- (7) For child-custody proceedings in Alaska (except for notices to the Metlakatla Indian Community, Annette Island Reserve, Alaska), notices must be sent to the following address: Juneau Regional Director, Bureau of Indian Affairs, 709 West 9th Street, Juneau, Alaska 99802-1219. Notices to the Metlakatla Indian Community, Annette Island Reserve, Alaska, must be sent to the Portland Regional Director at the address listed in paragraph (b)(11) of this section.
- (8) For child-custody proceedings in Arkansas, Missouri, or the eastern Oklahoma counties of Adair, Atoka, Bryan, Carter, Cherokee, Craig, Creek, Choctaw, Coal, Delaware, Garvin, Grady, Haskell, Hughes, Jefferson, Johnson, Latimer, LeFlore, Love, Mayes, McCurtain, McClain, McIntosh, Murray, Muskogee, Nowata, Okfuskee, Okmulgee, Osage, Ottawa, Pittsburg, Pontotoc, Pushmataha, Marshall, Rogers, Seminole, Sequoyah, Stephens, Tulsa, Wagoner, or Washington, notices must be sent to the following address: Muskogee Regional Director, Bureau of Indian Affairs, 101 North Fifth Street, Muskogee, Oklahoma 74401.
- (9) For child-custody proceedings in the Arizona counties of Apache, Coconino (except for notices to the Hopi Tribe of Arizona and the San Juan Southern Paiute Tribe of Arizona) or Navajo (except for notices to the Hopi Tribe of Arizona); the New Mexico counties of McKinley (except for notices to the Zuni Tribe of the Zuni Reservation), San Juan, or Socorro; or the Utah county of San Juan, notices must be sent to the following address: Navajo Regional Director, Bureau of Indian Affairs, P.O. Box 1060, Gallup, New Mexico 87301. Notices to the Hopi and San Juan Southern Paiute Tribes of Arizona must be sent to the Phoenix Regional Director at the address listed in paragraph (b)(10) of this section. Notices to the Zuni Tribe of the Zuni Reservation must be sent to the Albuquerque Regional Director at the address listed in paragraph (b)(6) of this section).
- (10) For child-custody proceedings in Arizona (exclusive of notices to the Navajo Nation from those counties listed in paragraph (b)(9) of this section), Nevada, or Utah (exclusive of San Juan County), notices must be sent to the following

address: Phoenix Regional Director, Bureau of Indian Affairs, 1 North First Street, P.O. Box 10, Phoenix, Arizona 85001.

- (11) For child-custody proceedings in Idaho, Oregon, or Washington, notices must be sent to the following address: Portland Regional Director, Bureau of Indian Affairs, 911 NE 11th Avenue, Portland, Oregon 97232. All notices to the Confederated Salish and Kootenai Tribes of the Flathead Reservation, located in the Montana counties of Flathead, Lake, Missoula, and Sanders, must also be sent to the Portland Regional Director.
- (12) For child-custody proceedings in California or Hawaii, notices must be sent to the following address: Sacramento Regional Director, Bureau of Indian Affairs, Federal Office Building, 2800 Cottage Way, Sacramento, California 95825.

(c) Upon receipt of the notice, the Secretary will make reasonable documented efforts to locate and notify the child's Tribe and the child's parent or Indian custodian. The Secretary will have 15 days, after receipt of the notice, to notify the child's Tribe and parents or Indian custodians and to send a copy of the notice to the court. If within the 15-day period the Secretary is unable to verify that the child meets the criteria of an Indian child as defined in §23.2, or is unable to locate the parents or Indian custodians, the Secretary will so inform the court and state how much more time, if any, will be needed to complete the verification or the search. The Secretary will complete all research efforts, even if those efforts cannot be completed before the child-custody proceeding begins.

(d) Upon request from a party to an Indian child-custody proceeding, the Secretary will make a reasonable attempt to identify and locate the child's Tribe, parents, or Indian custodians to assist the party seeking the information.

[81 FR 38866, June 14, 2016]

### **§23.12 Designated tribal agent for service of notice.**

Any Indian tribe entitled to notice pursuant to 25 U.S.C. 1912 may designate by resolution, or by such other form as the tribe's constitution or current practice requires, an agent for service of notice other than the tribal chairman and send a copy of the designation to the Secretary or his/her designee. The Secretary or his/her designee shall update and publish as necessary the names and addresses of the designated agents in the FEDERAL REGISTER. A current listing of such agents shall be available through the area offices.

### **§23.13 Payment for appointed counsel in involuntary Indian child custody proceedings in state courts.**

(a) When a state court appoints counsel for an indigent Indian party in an involuntary Indian child custody proceeding for which the appointment of counsel is not authorized under state law, the court shall send written notice of the appointment to the BIA Regional Director designated for that state in §23.11. The notice shall include the following:

- (1) Name, address, and telephone number of attorney who has been appointed.
- (2) Name and address of client for whom counsel is appointed.
- (3) Relationship of client to child.
- (4) Name of Indian child's tribe.
- (5) Copy of the petition or complaint.

- (6) Certification by the court that state law makes no provision for appointment of counsel in such proceedings.
  - (7) Certification by the court that the Indian client is indigent.
- (b) The Regional Director shall certify that the client is eligible to have his or her appointed counsel compensated by the BIA unless:
- (1) The litigation does not involve a child custody proceeding as defined in 25 U.S.C. 1903 (1);
  - (2) The child who is the subject of the litigation is not an Indian child as defined in 25 U.S.C. 1903 (4);
  - (3) The client is neither the Indian child who is the subject of the litigation, the Indian child's parent as defined in 25 U.S.C. 1903 (9), nor the child's Indian custodian as defined in 25 U.S.C. 1903 (6);
  - (4) State law provides for appointment of counsel in such proceedings;
  - (5) The notice to the Regional Director of appointment of counsel is incomplete; or
  - (6) Funds are not available for the particular fiscal year.
- (c) No later than 10 days after receipt of the notice of appointment of counsel, the Regional Director shall notify the court, the client, and the attorney in writing whether the client has been certified as eligible to have his or her attorney fees and expenses paid by the BIA. If certification is denied, the notice shall include written reasons for that decision, together with a statement that complies with 25 CFR 2.7 and that informs the applicant that the decision may be appealed to the Assistant Secretary. The Assistant Secretary shall consider appeals under this subsection in accordance with 25 CFR 2.20 (c) through (e). Appeal procedures shall be as set out in part 2 of this chapter.
- (d) When determining attorney fees and expenses, the court shall:
- (1) Determine the amount of payment due appointed counsel by the same procedures and criteria it uses in determining the fees and expenses to be paid appointed counsel in state juvenile delinquency proceedings; and
  - (2) Submit approved vouchers to the Regional Director who certified eligibility for BIA payment, together with the court's certification that the amount requested is reasonable under the state standards considering the work actually performed in light of criteria that apply in determining fees and expenses for appointed counsel in state juvenile delinquency proceedings.
- (e) The Regional Director shall authorize the payment of attorney fees and expenses in the amount requested in the voucher approved by the court unless:
- (1) The amount of payment due the state-appointed counsel is inconsistent with the fees and expenses specified in §23.13 (d)(1); or
  - (2) The client has not been certified previously as eligible under paragraph (c) of this section; or
  - (3) The voucher is submitted later than 90 days after completion of the legal action involving a client certified as eligible for payment of legal fees under paragraph (b) of this section.
- (f) No later than 15 days after receipt of a payment voucher, the Regional Director shall send written notice to the court, the client, and the attorney stating the amount of payment, if any, that has been authorized. If the payment has been denied, or the amount authorized is less

than the amount requested in the voucher approved by the court, the notice shall include a written statement of the reasons for the decision together with a statement that complies with 25 CFR 2.7 and that informs the client that the decision may be appealed to the Interior Board of Indian Appeals in accordance with 25 CFR 2.4 (e); 43 CFR 4.310 through 4.318 and 43 CFR 4.330 through 4.340.

(g) Failure of the Regional Director to meet the deadline specified in paragraphs (c) and (f) of this section may be treated as a denial for purposes of appeal under paragraph (f) of this section.

(h) Payment for appointed counsel does not extend to Indian tribes involved in state court child custody proceedings or to Indian families involved in Indian child custody proceedings in tribal courts.

### **Subpart C—Grants to Indian Tribes for Title II Indian Child and Family Service Programs**

#### **§23.21 Noncompetitive tribal government grants.**

(a) ***Grant application information and technical assistance.*** Information on grant application procedures and related information may be obtained from the appropriate Agency Superintendent or Regional Director. Pre-award and ongoing technical assistance to tribal governments shall be provided in accordance with §23.42 of this part.

(b) ***Eligibility requirements for tribal governments.*** The tribal government(s) of any Indian tribe or consortium of tribes may submit a properly documented application for a grant to the appropriate Agency Superintendent or Regional Director. A tribe may neither submit more than one application for a grant nor be the beneficiary of more than one grant under this subpart.

(1) Through the publication of a FEDERAL REGISTER announcement at the outset of the implementation of the noncompetitive grant award process during which tribal applications will be solicited, the Assistant Secretary will notify eligible tribal applicants under this subpart of the amount of core funds available for their ICWA program. The funding levels will be based on the service area population to be served. Upon the receipt of this notice from the Agency Superintendent or appropriate Regional Director, tribal applicants shall submit a completed ICWA application no later than 60 days after the receipt of this notice.

(2) A grant to be awarded under this subpart shall be limited to the tribal governing body(ies) of the tribe(s) to be served by the grant.

(3) For purposes of eligibility for newly recognized or restored Indian tribes without established reservations, such tribes shall be deemed eligible to apply for grants under this subpart to provide ICWA services within those service areas legislatively identified for such tribes.

(4) A grantee under this subpart may make a subgrant to another Indian tribe or an Indian organization subject to the provisions of §23.45.

(c) ***Revision or amendment of grants.*** A grantee under this subpart may submit a written request and justification for a post-award grant modification covering material changes to the terms and conditions of the grant, subject to the approval of the grants officer. The request shall include a narrative description of any significant additions, deletions, or changes to the approved program activities or budget in the form of a grant amendment proposal.

(d) Continued annual funding of an ICWA grant under this subpart shall be contingent upon the fulfillment of the requirements delineated at §23.23(c).

(e) Monitoring and program reporting requirements for grantees under this subpart are delineated at §§23.44 and 23.47.

### **§23.22 Purpose of tribal government grants.**

(a) Grants awarded under this subpart are for the establishment and operation of tribally designed Indian child and family service programs. The objective of every Indian child and family service program shall be to prevent the breakup of Indian families and to ensure that the permanent removal of an Indian child from the custody of his or her Indian parent or Indian custodian shall be a last resort. Such child and family service programs may include, but need not be limited to:

- (1) A system for licensing or otherwise regulating Indian foster and adoptive homes, such as establishing tribal standards for approval of on-reservation foster or adoptive homes;
- (2) The operation and maintenance of facilities for counseling and treatment of Indian families and for the temporary custody of Indian children with the goal of strengthening Indian families and preventing parent-child separations;
- (3) Family assistance, including homemaker and home counselors, protective day care and afterschool care, recreational activities, respite care, and employment support services with the goal of strengthening Indian families and contributing to family stability;
- (4) Home improvement programs with the primary emphasis on preventing the removal of children due to unsafe home environments by making homes safer, but not to make extensive structural home improvements;
- (5) The employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters, but not to establish tribal court systems;
- (6) Education and training of Indians, including tribal court judges and staff, in skills relating to child and family assistance and service programs;
- (7) A subsidy program under which Indian adoptive children not eligible for state or BIA subsidy programs may be provided support comparable to that for which they could be eligible as foster children, taking into account the appropriate state standards of support for maintenance and medical needs;
- (8) Guidance, legal representation and advice to Indian families involved in tribal, state, or Federal child custody proceedings; and
- (9) Other programs designed to meet the intent and purposes of the Act.

(b) Grants may be provided to tribes in the preparation and implementation of child welfare codes within their jurisdiction or pursuant to a tribal-state agreement.

(c) Grantees under this subpart may enhance their capabilities by utilizing ICWA funds as non-Federal matching shares in connection with funds provided under titles IV-B, IV-E and XX of the Social Security Act or other Federal programs which contribute to and promote the intent and purposes of the Act through the provision of comprehensive child and family services in coordination with other tribal, Federal, state, and local resources available for the same purpose.

(d) Program income resulting from the operation of programs under this subpart, such as day care operations, may be retained and used for purposes similar to those for which the grant was awarded.

**§23.23 Tribal government application contents.**

(a) The appropriate Regional Director shall, subject to the tribe's fulfillment of the mandatory application requirements and the availability of appropriated funds, make a grant to the tribal governing body of a tribe or consortium of tribes eligible to apply for a grant under this subpart.

(b) The following mandatory tribal application requirements must be submitted to the appropriate Agency Superintendent or Regional Director in accordance with the timeframe established in §23.21 (b) of this subpart:

- (1) A current tribal resolution requesting a grant by the Indian tribe(s) to be served by the grant. If an applicant is applying for a grant benefiting more than one tribe (consortium), an authorizing resolution from each tribal government to be served must be included. The request must be in the form of a current tribal resolution by the tribal governing body and shall include the following information:
  - (i) The official name of tribe(s) applying for the grant and who will directly benefit from or receive services from the grant;
  - (ii) The proposed beginning and ending dates of the grant;
  - (iii) A provision stating that the resolution will remain in effect for the duration of the program or until the resolution expires or is rescinded; and
  - (iv) The signature of the authorized representative of the tribal government and the date thereof.
- (2) A completed Application for Federal Assistance form, SF-424.
- (3) A narrative needs assessment of the social problems or issues affecting the resident Indian population to be served; the geographic area(s) to be served; and estimated number of resident Indian families and/or persons to receive benefits or services from the program.
- (4) A comprehensive developmental multi-year plan in narrative form describing what specific services and/or activities will be provided each program year and addressing the above-identified social problems or issues. At a minimum, the plan must include:
  - (i) The program goals and objectives, stated in measurable terms, to be achieved through the grant;
  - (ii) A narrative description of how Indian families and communities will benefit from the program; and
  - (iii) The methodology, including culturally defined approaches, and procedures by which the tribe(s) will accomplish the identified goals and objectives.
- (5) An internal monitoring system to measure progress and accomplishments, and to assure that the quality and quantity of actual performance conforms to the requirements of the grant.

- (6) A staffing plan that is consistent with the implementation of the above-described program plan of operation and the procedures necessary for the successful delivery of services.
  - (i) The plan must include proposed key personnel; their qualifications, training or experience relevant to the services to be provided; responsibilities; Indian preference criteria for employment; and position descriptions.
  - (ii) In accordance with 25 U.S.C. 3201 *et seq.* (Pub. L. 101-630), title IV, the Indian Child Protection and Family Violence Prevention Act, grantees shall conduct character and background investigations of those personnel identified in that statute. Grantees must initiate character and background investigations of said personnel prior to their actual employment, and complete the investigations in a timely manner.
- (7) A program budget and budget narrative justification submitted on an annual basis for the amount of the award and supported by the proposed plan, appropriate program services and activities for the applicable grant year.
- (8) Identification of any consultants and/or subgrantees the applicant proposes to employ; a description of the consultant and/or subgrantee services to be rendered; the qualifications and experience in performing the identified services; and the basis for the cost and amount to be paid for such services.
- (9) A certification by a licensed accountant that the bookkeeping and accounting procedures which the tribe(s) uses or intends to use meet existing Federal standards for grant management and administration specified at §23.46.
- (10) A system for managing property and recordkeeping which complies with subpart D of 43 CFR part 2 implementing the Privacy Act (5 U.S.C. 552a) and with existing Federal requirements for grants at 25 CFR 276.5 and 276.11, including the maintenance and safeguarding of direct service case records on families and/or individuals served by the grant.
- (11) A listing of equipment, facilities, and buildings necessary to carry out the grant program. Liability insurance coverage for buildings and their contents is recommended for grantees under this subpart.
- (12) Pursuant to the Drug-Free Workplace Act of 1988, tribal programs shall comply with the mandatory Drug-Free Workplace Certification, a regulatory requirement for Federal grant recipients.

(c) Continued annual funding of an ICWA program under this subpart shall be contingent upon the existing grant program receiving a satisfactory program evaluation from the area social services office for the previous year of operation. A copy of this evaluation must be submitted together with an annual budget and budget narrative justification in accordance with paragraph (b)(7) of this section. Minimum standards for receiving a satisfactory evaluation shall include:

- (1) The timely submission of all fiscal and programmatic reports;
- (2) A narrative program report indicating work accomplished in accordance with the applicant's approved multi-year plan and, if applicable, a description of any modification in programs or activities to be funded in the next fiscal year; and

- (3) The implementation of mutually determined corrective action measures, if applicable.

## **Subpart D—Grants to Off-Reservation Indian Organizations for Title II Indian Child and Family Service Programs**

### **§23.31 Competitive off-reservation grant process.**

(a) Grant application procedures and related information may be obtained from the Regional Director designated at §23.11 for processing ICWA notices for the state in which the applicant is located. Pre-award and ongoing technical assistance of off-reservation Indian organization grantees shall be provided in accordance with §23.42.

(b) Prior to the beginning of or during the applicable year(s) in which grants for off-reservation programs will be awarded competitively, the Assistant Secretary—Indian Affairs shall publish in the FEDERAL REGISTER an announcement of the grant application process for the year(s), including program priorities or special considerations (if any), applicant eligibility criteria, the required application contents, the amount of available funding and evaluation criteria for off-reservation programs.

(c) Based on the announcement described in paragraph (b) of this section, an off-reservation applicant shall prepare a multi-year developmental application in accordance with §23.33 of this subpart. To be considered in the area competitive review and scoring process, a complete application must be received by the deadline announced in the FEDERAL REGISTER by the Regional Director designated at §23.11 for processing ICWA notices for the state in which the applicant is located.

(d) Eligibility requirements for off-reservation Indian organizations. The Secretary or his/her designee shall, contingent upon the availability of funds, make a multi-year grant under this subpart for an off-reservation program when officially requested by a resolution of the board of directors of the Indian organization applicant, upon the applicant's fulfillment of the mandatory application requirements and upon the applicant's successful competition pursuant to §23.33 of this subpart.

(e) A grant under this subpart for an off-reservation Indian organization shall be limited to the board of directors of the Indian organization which will administer the grant.

(f) Continued annual funding of a multi-year grant award to an off-reservation ICWA program under this subpart shall be contingent upon the grantee's fulfillment of the requirements delineated at §23.33 (e).

(g) Monitoring and program reporting requirements for grants awarded to off-reservation Indian organizations under this subpart are delineated at §§23.44 and 23.47.

### **§23.32 Purpose of off-reservation grants.**

The Secretary or his/her designee is authorized to make grants to off-reservation Indian organizations to establish and operate off-reservation Indian child and family service programs for the purpose of stabilizing Indian families and tribes, preventing the breakup of Indian families and, in particular, to ensure that the permanent removal of an Indian child from the custody of his/her Indian parent or Indian custodian shall be a last resort. Child and family service programs may include, but are not limited to:



(a) A system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as Indian foster children, taking into account the appropriate state standards of support for maintenance and medical needs;

(b) The operation and maintenance of facilities and services for counseling and treatment of Indian families and Indian foster and adoptive children with the goal of strengthening and stabilizing Indian families;

(c) Family assistance (including homemaker and home counselors), protective day care and afterschool care, employment support services, recreational activities, and respite care with the goal of strengthening Indian families and contributing toward family stability; and

(d) Guidance, legal representation and advice to Indian families involved in state child custody proceedings.

### **§23.33 Competitive off-reservation application contents and application selection criteria.**

(a) An application for a competitive multi-year grant under this subpart shall be submitted to the appropriate Regional Director prior to or on the announced deadline date published in the FEDERAL REGISTER. The Regional Director shall certify the application contents pursuant to §23.34 and forward the application within five working days to the area review committee, composed of members designated by the Regional Director, for competitive review and action. Modifications and/or information received after the close of the application period, as announced in the FEDERAL REGISTER, shall not be reviewed or considered by the area review committee in the competitive process.

(b) Mandatory application requirements for Indian organization applicants shall include:

- (1) An official request for an ICWA grant program from the organization's board of directors covering the duration of the proposed program;
  - (2) A completed Application for Federal Assistance form, SF 424;
  - (3) Written assurances that the organization meets the definition of Indian organization at §23.2;
  - (4) A copy of the organization's current Articles of Incorporation for the applicable grant years;
  - (5) Proof of the organization's nonprofit status;
  - (6) A copy of the organization's IRS tax exemption certificate and IRS employer identification number;
  - (7) Proof of liability insurance for the applicable grant years; and
  - (8) Current written assurances that the requirements of Circular A-128 for fiscal management, accounting, and recordkeeping are met.
- (9) Pursuant to the Drug-Free Workplace Act of 1988, all grantees under this subpart shall comply with the mandatory Drug-Free Workplace Certification, a regulatory requirement for Federal grant recipients.

(c) **Competitive application selection criteria.** The Regional Director or his/her designated representative shall select those proposals which will in his/her judgment best promote the purposes of the Act. Selection shall be made through the area review committee process in which each application will be scored individually and ranked according to score, taking into consideration the mandatory requirements as specified above and the following selection criteria:

- (1) The degree to which the application reflects an understanding of the social problems or issues affecting the resident Indian client population which the applicant proposes to serve;
- (2) Whether the applicant presents a narrative needs assessment, quantitative data and demographics of the client Indian population to be served;
- (3) Estimates of the number of Indian people to receive benefits or services from the program based on available data;
- (4) Program goals and objectives to be achieved through the grant;
- (5) A comprehensive developmental multi-year narrative plan describing what specific services and/or activities will be provided each program year and addressing the above-identified social problems or issues. At a minimum, the plan must include a narrative description of the program; the program goals and objectives, stated in measurable terms, to be achieved through the grant; and the methodology, including culturally defined approaches, and procedures by which the grantee will accomplish the identified goals and objectives;
- (6) An internal monitoring system the grantee will use to measure progress and accomplishments, and to ensure that the quality and quantity of actual performance conforms to the requirements of the grant;
- (7) Documentation of the relative accessibility which the Indian population to be served under a specific proposal already has to existing child and family service programs emphasizing the prevention of Indian family breakups, such as mandatory state services. Factors to be considered in determining accessibility include:
  - (i) Cultural barriers;
  - (ii) Discrimination against Indians;
  - (iii) Inability of potential Indian clientele to pay for services;
  - (iv) Technical barriers created by existing public or private programs;
  - (v) Availability of transportation to existing programs;
  - (vi) Distance between the Indian community to be served under the proposal and the nearest existing programs;
  - (vii) Quality of services provided to Indian clientele; and
  - (viii) Relevance of services provided to specific needs of the Indian clientele.
- (8) If the proposed program duplicates existing Federal, state, or local child and family service programs emphasizing the prevention of Indian family breakups, proper and current documented evidence that repeated attempts to obtain services have been unsuccessful;
- (9) Evidence of substantial support from the Indian community or communities to be served, including but not limited to:
  - (i) Tribal support evidenced by a tribal resolution or cooperative service agreements between the administrative bodies of the affected tribe(s) and the applicant for the duration of the grant period, or
  - (ii) Letters of support from social services organizations familiar with the applicant's past work experience;

- (10) A staffing plan that is consistent with the implementation of the above-described program plan of operation and the procedures necessary for the successful delivery of services. The plan must include proposed key personnel, their qualifications, training or experience relevant to the services to be provided, responsibilities, Indian preference criteria for employment and position descriptions. In accordance with 25 U.S.C. 3201 *et seq.* (Pub. L. 101-630), title IV, the Indian Child Protection and Family Violence Prevention Act, grantees shall conduct character and background investigations of those personnel identified in that statute prior to their actual employment;
- (11) The reasonableness and relevance of the estimated overall costs of the proposed program or services and their overall relation to the organization's funding base, activities, and mission;
- (12) The degree to which the detailed annual budget and justification for the requested funds are consistent with, and clearly supported by, the proposed plan and by appropriate program services and activities for the applicable grant year;
- (13) The applicant's identification of any consultants and/or subgrantees it proposes to employ; description of the services to be rendered; the qualifications and experience of said personnel, reflecting the requirements for performing the identified services; and the basis for the cost and the amount to be paid for such services;
- (14) Certification by a licensed accountant that the bookkeeping and accounting procedures that the applicant uses or intends to use meet existing Federal standards for grant administration and management specified at §23.46;
- (15) The compliance of property management and recordkeeping systems with subpart D of 43 CFR part 2 (the Privacy Act, 5 U.S.C. 552a), and with existing Federal requirements for grants at 25 CFR 276.5 and 276.11, including the maintenance and safeguarding of direct service case records on families and/or individuals served by the grant;
- (16) A description of the proposed facilities, equipment, and buildings necessary to carry out the grant activities; and
- (17) Proof of liability insurance coverage for the applicable grant year(s).

(d) Two or more applications receiving the same competitive score will be prioritized in accordance with announcements made in the FEDERAL REGISTER pursuant to §23.31 (b) for the applicable year(s).

(e) Continued annual funding of a multi-year grant award to an off-reservation ICWA program under this subpart shall be contingent upon the availability of appropriated funds and upon the existing grant program receiving a satisfactory program evaluation from the area social services office for the previous year of operation. A copy of this evaluation shall be submitted together with an annual budget and budget narrative justification in accordance with paragraph (c)(10) of this section. Minimum standards for receiving a satisfactory evaluation shall include the timely submission of all fiscal and programmatic reports; a narrative program report indicating work accomplished in accordance with the initial approved multi-year plan; and the implementation of mutually determined corrective action measures, if applicable.

**§23.34 Review and decision on off-reservation applications by Regional Director.**

(a) *Area office certification.* Upon receipt of an application for a grant by an off-reservation Indian organization at the area office, the Regional Director shall:

- (1) Complete and sign the area office certification form. In completing the area certification form, the Regional Director shall assess and certify whether applications contain and meet all the application requirements specified at §23.33. Regional Directors shall be responsible for the completion of the area office certification forms for all applications submitted by off-reservation Indian organizations.
- (2) Acknowledge receipt of the application to the applicant and advise the applicant of the disposition of the application within 10 days of receipt; and
- (3) Transmit all applications within five working days of receipt to the area review committee for competitive review and subsequent approval or disapproval of the applications.

(b) *Area office competitive review and decision for off-reservation applications.* Upon receipt of an application for an off-reservation grant under this part requiring the approval of the Regional Director, the Regional Director shall:

- (1) Establish and convene an area review committee, chaired by a person qualified by knowledge, training and experience in the delivery of Indian child and family services.
- (2) Review the area office certification form required in paragraph (a) of this section.
- (3) Review the application in accordance with the competitive review procedures prescribed in §23.33. An application shall not receive approval for funding under the area competitive review and scoring process unless a review of the application determines that it:
  - (i) Contains all the information required in §23.33 which must be received by the close of the application period. Modifications of the grant application received after the close of the application period shall not be considered in the competitive review process.
  - (ii) Receives at least the established minimum score in an area competitive review, using the application selection criteria and scoring process set out in §23.33. The minimum score shall be established by the Central Office prior to each application period and announced in the FEDERAL REGISTER for the applicable grants year(s).
- (4) Approve or disapprove the application and promptly notify the applicant in writing of the approval or disapproval of the application. If the application is disapproved, the Regional Director shall include in the written notice the specific reasons therefore.

(c) The actual funding amounts for the initial grant year shall be subject to appropriations available nationwide and the continued funding of an approved off-reservation grant application under subpart D of this part shall be subject to available funds received by the respective area office for the applicable grant year. Initial funding decisions and subsequent decisions with respect to funding level amounts for all approved grant applications under this part shall be made by the Regional Director.

### **§23.35 Deadline for Central Office action.**

Within 30 days of the receipt of grant reporting forms from the Regional Directors identifying approved and disapproved applications pursuant to subpart D of this part and recommended funding levels for approved applications, the Secretary or his/her designee shall process the Regional Directors' funding requests.

## **Subpart E—General and Uniform Grant Administration Provisions and Requirements**

### **§23.41 Uniform grant administration provisions, requirements and applicability.**

The general and uniform grant administration provisions and requirements specified at 25 CFR part 276 and under this subpart are applicable to all grants awarded to tribal governments and off-reservation Indian organizations under this part, except to the extent inconsistent with an applicable Federal statute, regulation or OMB circular.

### **§23.42 Technical assistance.**

(a) Pre-award and ongoing technical assistance may be requested by an Indian tribe or off-reservation Indian organization from the appropriate agency or area office to which the tribe or organization will be submitting an application for funds under subparts C and D of this part. A request for pre-award technical assistance by an off-reservation Indian organization must be received by the Regional Director designated at §23.11 for the state in which the applicant is located no later than 10 days prior to the application deadline to assure sufficient time for area response.

(b) Pre-award and ongoing technical assistance may be provided by the appropriate BIA agency or area office for purposes of program planning and design, assistance in establishing internal program monitoring and evaluation criteria for ongoing grant administration and management, and for other appropriate assistance requested.

(c) The area social services staff shall provide technical assistance to grantees upon receipt of an authorized request from the grantee or when review of the grantee's quarterly performance reports shows that:

- (1) An ICWA program is yielding results that are or will be detrimental to the welfare of the intended Indian beneficiaries of the program;
- (2) A program has substantially failed to implement its goals and objectives;
- (3) There are serious irregularities in the fiscal management of the grant; or
- (4) The grantee is otherwise deficient in its program performance.
- (5) Upon receiving an authorized request from the grantee, the area social services staff and/or grants officer shall provide the necessary technical assistance to arrive at mutually determined corrective action measures and their actual implementation, if necessary, and the timeframes within which said corrective actions will be implemented.

### **§23.43 Authority for grant approval and execution.**

(a) *Tribal government programs.* The appropriate Agency Superintendent or Regional Director may approve a grant application and its subsequent execution under subpart C when the

intent, purpose and scope of the application pertains solely to reservations located within the service area jurisdiction of the agency or area office.

(b) **Off-reservation programs.** The appropriate Regional Director may approve a grant application and its subsequent execution under subpart D when the intent, purpose and scope of the grant proposal pertains to off-reservation Indian service populations or programs.

#### **§23.44 Grant administration and monitoring.**

All grantees under this part shall be responsible for managing day-to-day program operations to ensure that program performance goals are being achieved and to ensure compliance with the provisions of the grant award document and other applicable Federal requirements. Unless delegated to the Agency Superintendent, appropriate area office personnel designated by the Regional Director shall be responsible for all grant program and fiscal monitoring responsibilities.

#### **§23.45 Subgrants.**

A tribal government grantee may make a subgrant under subpart C of this part, provided that such subgrants are for the purpose for which the grant was made and that the grantee retains administrative and financial responsibility over the activity and the funds.

#### **§23.46 Financial management, internal and external controls and other assurances.**

Grantee financial management systems shall comply with the following standards for accurate, current and complete disclosure of financial activities.

(a) OMB Circular A-87 (Cost principles for state and local governments and federally recognized Indian tribal governments).

(b) OMB Circular A-102 (Common rule 43 CFR part 12).

(c) OMB Circular A-128 (Single Audit Act).

(d) OMB Circular A-110 or 122 (Cost principles for non-profit organizations and tribal organizations, where applicable).

(e) **Internal control.** Effective control and accountability must be maintained for all grants. Grantees must adequately safeguard any property and must ensure that it is used solely for authorized purposes.

(f) **Budget control.** Actual expenditures must be compared with budgeted amounts for the grant. Financial information must be related to program performance requirements.

(g) **Source documentation.** Accounting records must be supported by such source documentation as cancelled checks, paid bills, payrolls, time and attendance records, grant documents, or other information required by the grantee's financial management system. The Secretary or his/her designee may review the adequacy of the financial management system of an Indian tribe(s) or off-reservation Indian organization applying for a grant under this part.

(h) Pursuant to 18 U.S.C. 641, whoever embezzles, steals, purloins, or knowingly converts to his or her use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or whoever receives, conceals, or retains the same with intent to convert it to his or her use or gain, knowing it to have been embezzled, stolen, purloined, or

converted shall be fined not more than \$10,000 or imprisoned not more than 10 years, or both; but if the value of such property does not exceed the sum of \$100, he or she shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

**§23.47 Reports and availability of information to Indians.**

(a) Any tribal government or off-reservation Indian organization receiving a grant under this part shall make general programmatic information and reports concerning that grant available to the Indian people it serves or represents. Access to this information may be requested in writing and shall be made available within 10 days of receipt of the request. Except as required by title IV of Pub. L. 101-630, the Indian Child Protection and Family Violence Prevention Act, grantees shall hold confidential all information obtained from persons receiving services from the program, and shall not release such information without the individual's written consent. Information may be disclosed in a manner which does not identify or lead to the identification of particular individuals.

(b) Grantees shall submit Standard Form 269 or 269A on a quarterly and an annual basis to report their status of funds by the dates specified in the grant award document.

(c) Grantees shall furnish and submit the following written quarterly and annual program reports by the dates specified in the award document:

(1) Quarterly and annual statistical and narrative program performance reports which shall include, but need not be limited to, the following;

(i) A summary of actual accomplishments and significant activities as related to program objectives established for the grant period;

(ii) The grantee's evaluation of program performance using the internal monitoring system submitted in their application;

(iii) Reports on all significant ICWA direct service grant activities including but not limited to the following information:

(A) Significant title II activities;

(B) Data reflecting numbers of individuals referred for out-of-home placements, number of individuals benefiting from title II services and types of services provided, and

(C) Information and referral activities.

(iv) Child abuse and neglect statistical reports and related information as required by 25 U.S.C. 2434, Pub. L. 99-570, the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986;

(v) A summary of problems encountered or reasons for not meeting established objectives;

(vi) Any deliverable or product required in the grant; and

(vii) Additional pertinent information when appropriate.

(2) The BIA may negotiate for the provision of other grant-related reports not previously identified.

(d) Events may occur between scheduled performance reporting dates which have significant impact on the grant-supported activity. In such cases, the grantee must inform the awarding agency as soon as problems, delays, adverse conditions, or serious incidents giving rise to liability become known and which will materially impair its ability to meet the objectives of the grant.

#### **§23.48 Matching shares and agreements.**

(a) Grant funds provided to Indian tribes under subpart C of this part may be used as non-Federal matching shares in connection with funds provided under titles IV-B, IV-E and XX of the Social Security Act or such other Federal programs which contribute to and promote the purposes of the Act as specified in §§23.3 and 23.22 (25 U.S.C. 1931).

(b) Pursuant to 25 U.S.C. 1933, in furtherance of the establishment, operation, and funding of programs funded under subparts C and D of this part, the Secretary may enter into agreements with the Secretary of Health and Human Services. The latter Secretary is authorized by the Act to use funds appropriated for the Department of Health and Human Services for programs similar to those funded under subparts C and D of this part (25 U.S.C. 1931 and 1932), provided that authority to make payment pursuant to such agreements shall be effective only to the extent and in such amounts as may be provided in advance by appropriation Acts.

#### **§23.49 Fair and uniform provision of services.**

(a) Grants awarded under this part shall include provisions assuring compliance with the Indian Civil Rights Act; prohibiting discriminatory distinctions among eligible Indian beneficiaries; and assuring the fair and uniform provision by the grantees of the services and assistance they provide to eligible Indian beneficiaries under such grants. Such procedures must include criteria by which eligible Indian beneficiaries will receive services, recordkeeping mechanisms adequate to verify the fairness and uniformity of services in cases of formal complaints, and an explanation of what rights will be afforded an individual pending the resolution of a complaint.

(b) Indian beneficiaries of the services to be rendered under a grant shall be afforded access to administrative or judicial bodies empowered to adjudicate complaints, claims, or grievances brought by such Indian beneficiaries against the grantee arising out of the performance of the grant.

#### **§23.50 Service eligibility.**

(a) Tribal government Indian child and family service programs. Any person meeting the definition of Indian, Indian child, Indian custodian, or Indian parent of any unmarried person under the age of 18 as defined in §23.2 is eligible for services provided under 25 U.S.C. 1931 of the Act. Tribal membership status shall be determined by tribal law, ordinance, or custom. The tribe may, under subpart C, extend services to nontribal family members related by marriage to tribal members, provided such services promote the intent and purposes of the Act. A tribe may also, within available resources, extend services under this part to individuals who are members of, or are eligible for membership in other Indian tribes, and who reside within the tribe's designated service area.

(b) Off-reservation Indian child and family service programs and agreements with the Secretary of Health and Human Services pursuant to 25 U.S.C. 1933. For purposes of eligibility for services provided under 25 U.S.C. 1932 and 1933 of the Act, any person meeting the definition of Indian, Indian child, Indian custodian, or Indian parent of any unmarried person under the age of 18 as defined in §23.2, or the definition of Indian as defined in 25 U.S.C.



1603(c), shall be eligible for services. Tribal membership status shall be determined by tribal law, ordinance, or custom.

### **§23.51 Grant carry-over authority.**

Unless restricted by appropriation, and contingent upon satisfactory program evaluations from the appropriate area or agency office for an existing program, grantees are authorized to carry over unliquidated grant funds which remain at the end of a budget period. Such funds may be carried over for a maximum period of two years beyond the initial grant funding period and must be utilized only for the intent, purpose and scope of the original grant. These carry-over grant funds shall not be reprogrammed into other appropriation activities or subactivities. Funds carried over into another fiscal year will be added to the grantee's new fiscal year funding amount.

### **§23.52 Grant suspension.**

(a) When a grantee has materially failed to comply and remains out of compliance with the terms and conditions of the grant, the grants officer may, after reasonable notice to the grantee and the provision of requested technical assistance, suspend the grant. The notice preceding the suspension shall include the effective date of the suspension, the corrective measures necessary for reinstatement of the grant and, if there is no immediate threat to safety, a reasonable timeframe for corrective action prior to actual suspension.

(b) No obligation incurred by the grantee during the period of suspension shall be allowable under the suspended grant, except that the grants officer may at his/her discretion allow necessary and proper costs which the grantee could not reasonably avoid during the period of suspension if such costs would otherwise be allowable under the applicable cost principles.

(c) Appropriate adjustments to the payments under the suspended grant will be made either by withholding the payments or by not allowing the grantee credit for disbursements which the grantee may make in liquidation of unauthorized obligations the grantee incurs during the period of suspension.

(d) Suspension shall remain in effect until the grantee has taken corrective action to the satisfaction of the grants officer, or given assurances satisfactory to the grants officer that corrective action will be taken, or until the grants officer cancels the grant.

### **§23.53 Cancellation.**

(a) The grants officer may cancel any grant, in whole or in part, at any time before the date of completion whenever it is determined that the grantee has:

- (1) Materially failed to comply with the terms and conditions of the grant;
- (2) Violated the rights as specified in §23.49 or endangered the health, safety, or welfare of any person; or
- (3) Been grossly negligent in, or has mismanaged the handling or use of funds provided under the grant.

(b) When it appears that cancellation of the grant will become necessary, the grants officer shall promptly notify the grantee in writing of this possibility. This written notice shall advise the grantee of the reason for the possible cancellation and the corrective action necessary to avoid cancellation. The grants officer shall also offer, and shall provide, if requested by the grantee,

any technical assistance which may be required to effect the corrective action. The grantee shall have 60 days in which to effect this corrective action before the grants officer provides notice of intent to cancel the grant as provided for in paragraph (c) of this section.

(c) Upon deciding to cancel for cause, the grants officer shall promptly notify the grantee in writing of that decision, the reason for the cancellation, and the effective date. The Regional Director or his/her designated official shall also provide a hearing for the grantee before cancellation. However, the grants officer may immediately cancel the grant, upon notice to the grantee, if the grants officer determines that continuance of the grant poses an immediate threat to safety. In this event, the Regional Director or his/her designated official shall provide a hearing for the grantee within 10 days of the cancellation.

(d) The hearing referred to in paragraph (c) of this section shall be conducted as follows:

- (1) The grantee affected shall be notified, in writing, at least 10 days before the hearing. The notice should give the date, time, place, and purpose of the hearing.
- (2) A written record of the hearing shall be made. The record shall include written statements submitted at the hearing or within five days following the hearing.

## **Subpart F—Appeals**

### **§23.61 Appeals from decision or action by Agency Superintendent, Regional Director or Grants Officer.**

A grantee or prospective applicant may appeal any decision made or action taken by the Agency Superintendent, Regional Director, or grants officer under subpart C or E of this part. Such an appeal shall be made to the Assistant Secretary who shall consider the appeal in accordance with 25 CFR 2.20 (c) through (e). Appeal procedures shall be as set out in part 2 of this chapter.

### **§23.62 Appeals from decision or action by Regional Director under subpart D.**

A grantee or applicant may appeal any decision made or action taken by the Regional Director under subpart D that is alleged to be in violation of the U.S. Constitution, Federal statutes, or the regulations of this part. These appeals shall be filed with the Interior Board of Indian Appeals in accordance with 25 CFR 2.4 (e); 43 CFR 4.310 through 4.318 and 43 CFR 4.330 through 4.340. However, an applicant may not appeal a score assigned to its application or the amount of grant funds awarded.

### **§23.63 Appeals from inaction of official.**

A person or persons whose interests are adversely affected, or whose ability to protect such interests is impeded by the failure of an official to act on a request to the official, may make the official's inaction the subject of an appeal under part 2 of this chapter.

## **Subpart G—Administrative Provisions**

### **§23.71 Recordkeeping and information availability.**

(a) The Division of Human Services, Bureau of Indian Affairs (BIA), is authorized to receive all information and to maintain a central file on all State Indian adoptions. This file is confidential and only designated persons may have access to it.

(b) Upon the request of an adopted Indian who has reached age 18, the adoptive or foster parents of an Indian child, or an Indian Tribe, BIA will disclose such information as may be necessary for purposes of Tribal enrollment or determining any rights or benefits associated with Tribal membership. Where the documents relating to such child contain an affidavit from the biological parent or parents requesting anonymity, BIA must certify to the Indian child's Tribe, where the information warrants, that the child's parentage and other circumstances entitle the child to enrollment under the criteria established by such Tribe.

(c) BIA will ensure that the confidentiality of this information is maintained and that the information is not subject to the Freedom of Information Act, 5 U.S.C. 552, as amended.  
[81 FR 38867, June 14, 2016]

## **Subpart H—Assistance to State Courts**

### **§23.81 Assistance in identifying witnesses.**

Upon the request of a party in an involuntary Indian child custody proceeding or of a court, the Secretary or his/her designee shall assist in identifying qualified expert witnesses. Such requests for assistance shall be sent to the Regional Director designated in §23.11(c). The BIA is not obligated to pay for the services of such expert witnesses.

### **§23.82 Assistance in identifying language interpreters.**

Upon the request of a party in an Indian child custody proceeding or of a court, the Secretary or his/her designee shall assist in identifying language interpreters. Such requests for assistance should be sent to the Regional Director designated in §23.11(c). The BIA is not obligated to pay for the services of such language interpreters.

### **§23.83 Assistance in locating biological parents of Indian child after termination of adoption.**

Upon the request of a child placement agency, the court or an Indian tribe, the Secretary or his/her designee shall assist in locating the biological parents or prior Indian custodians of an adopted Indian child whose adoption has been terminated pursuant to 25 U.S.C. 1914. Such requests for assistance should be sent to the Regional Director designated in §23.11(c).

## **Subpart I—Indian Child Welfare Act Proceedings**

SOURCE: 81 FR 38867, June 14, 2016, unless otherwise noted.

## **GENERAL PROVISIONS**

### **§23.101 What is the purpose of this subpart?**

The regulations in this subpart clarify the minimum Federal standards governing implementation of the Indian Child Welfare Act (ICWA) to ensure that ICWA is applied in all

States consistent with the Act's express language, Congress's intent in enacting the statute, and to promote the stability and security of Indian tribes and families.

### **§23.102 What terms do I need to know?**

The following terms and their definitions apply to this subpart. All other terms have the meanings assigned in §23.2.

**Agency** means a nonprofit, for-profit, or governmental organization and its employees, agents, or officials that performs, or provides services to biological parents, foster parents, or adoptive parents to assist in the administrative and social work necessary for foster, preadoptive, or adoptive placements.

**Indian organization** means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians or a Tribe, or a majority of whose members are Indians.

### **§23.103 When does ICWA apply?**

(a) ICWA includes requirements that apply whenever an Indian child is the subject of:

(1) A child-custody proceeding, including:

- (i) An involuntary proceeding;
- (ii) A voluntary proceeding that could prohibit the parent or Indian custodian from regaining custody of the child upon demand; and
- (iii) A proceeding involving status offenses if any part of the proceeding results in the need for out-of-home placement of the child, including a foster-care, preadoptive, or adoptive placement, or termination of parental rights.

(2) An emergency proceeding.

(b) ICWA does not apply to:

- (1) A Tribal court proceeding;
- (2) A proceeding regarding a criminal act that is not a status offense;
- (3) An award of custody of the Indian child to one of the parents including, but not limited to, an award in a divorce proceeding; or
- (4) A voluntary placement that either parent, both parents, or the Indian custodian has, of his or her or their free will, without a threat of removal by a State agency, chosen for the Indian child and that does not operate to prohibit the child's parent or Indian custodian from regaining custody of the child upon demand.

(c) If a proceeding listed in paragraph (a) of this section concerns a child who meets the statutory definition of "Indian child," then ICWA will apply to that proceeding. In determining whether ICWA applies to a proceeding, the State court may not consider factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the 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.

(d) If ICWA applies at the commencement of a proceeding, it will not cease to apply simply because the child reaches age 18 during the pendency of the proceeding.

### **§23.104 What provisions of this subpart apply to each type of child-custody proceeding?**

The following table lists what sections of this subpart apply to each type of child-custody proceeding identified in §23.103(a):

<b>Section</b>	<b>Type of proceeding</b>
23.101-23.106 (General Provisions)	Emergency, Involuntary, Voluntary.
<b><i>Pretrial Requirements:</i></b>	
23.107 (How should a State court determine if there is reason to know the child is an Indian child?)	Emergency, Involuntary, Voluntary.
23.108 (Who makes the determination as to whether a child is a member whether a child is eligible for membership, or whether a biological parent is a member of a Tribe?)	Emergency, Involuntary, Voluntary.
23.109 (How should a State court determine an Indian child's Tribe when the child may be a member or eligible for membership in more than one Tribe?)	Emergency, Involuntary, Voluntary.
23.110 (When must a State court dismiss an action?)	Involuntary, Voluntary.
23.111 (What are the notice requirements for a child-custody proceeding involving an Indian child?)	Involuntary (foster-care placement and termination of parental rights).
23.112 (What time limits and extensions apply?)	Involuntary (foster-care placement and termination of parental rights).
23.113 (What are the standards for emergency proceedings involving an Indian child?)	Emergency.
23.114 (What are the requirements for determining improper removal?)	Involuntary.
<b><i>Petitions to Transfer to Tribal Court:</i></b>	
23.115 (How are petitions for transfer of a proceeding made?)	Involuntary, Voluntary (foster-care placement and termination of parental rights).
23.116 (What happens after a petition for transfer is made?)	Involuntary, Voluntary (foster-care placement and termination of parental rights).
23.117 (What are the criteria for ruling on transfer petitions?)	Involuntary, Voluntary (foster-care placement and termination of parental rights).
23.118 (How is a determination of “good cause” to deny	Involuntary, Voluntary (foster-

transfer made?)	care placement and termination of parental rights).
23.119 (What happens after a petition for transfer is granted?)	Involuntary, Voluntary (foster-care placement and termination of parental rights).
<b><i>Adjudication of Involuntary Proceedings:</i></b>	
23.120 (How does the State court ensure that active efforts have been made?)	Involuntary (foster-care placement and termination of parental rights).
23.121 (What are the applicable standards of evidence?)	Involuntary (foster-care placement and termination of parental rights).
23.122 (Who may serve as a qualified expert witness?)	Involuntary (foster-care placement and termination of parental rights).
23.123 Reserved	N/A.
<b><i>Voluntary Proceedings:</i></b>	
23.124 (What actions must a State court undertake in voluntary proceedings?)	Voluntary.
23.125 (How is consent obtained?)	Voluntary.
23.126 (What information must a consent document contain?)	Voluntary.
23.127 (How is withdrawal of consent to a foster-care placement achieved?)	Voluntary.
23.128 (How is withdrawal of consent to a termination of parental rights or adoption achieved?)	Voluntary.
<b><i>Dispositions:</i></b>	
23.129 (When do the placement preferences apply?)	Involuntary, Voluntary.
23.130 (What placement preferences apply in adoptive placements?)	Involuntary, Voluntary.
23.131 (What placement preferences apply in foster-care or preadoptive placements?)	Involuntary, Voluntary.
23.132 (How is a determination of “good cause” to depart from the placement preferences made?)	Involuntary, Voluntary.
<b><i>Access:</i></b>	

23.133 (Should courts allow participation by alternative methods?)	Emergency, Involuntary.
23.134 (Who has access to reports and records during a proceeding?)	Emergency, Involuntary.
23.135 Reserved.	N/A.
<b><i>Post-Trial Rights &amp; Responsibilities:</i></b>	
23.136 (What are the requirements for vacating an adoption based on consent having been obtained through fraud or duress?)	Involuntary (if consent given under threat of removal), voluntary.
23.137 (Who can petition to invalidate an action for certain ICWA violations?)	Emergency (to extent it involved a specified violation), involuntary, voluntary.
23.138 (What are the rights to information about adoptees' Tribal affiliations?)	Emergency, Involuntary, Voluntary.
23.139 (Must notice be given of a change in an adopted Indian child's status?)	Involuntary, Voluntary.
<b><i>Recordkeeping:</i></b>	
23.140 (What information must States furnish to the Bureau of Indian Affairs?)	Involuntary, Voluntary.
23.141 (What records must the State maintain?)	Involuntary, Voluntary.
23.142 (How does the Paperwork Reduction Act affect this subpart?)	Emergency, Involuntary, Voluntary.
<b><i>Effective Date:</i></b>	
23.143 (How does this subpart apply to pending proceedings?)	Emergency, Involuntary, Voluntary.
<b><i>Severability:</i></b>	
23.144 (What happens if some portion of part is held to be invalid by a court of competent jurisdiction?)	Emergency, Involuntary, Voluntary.

**Note:** For purposes of this table, status-offense child-custody proceedings are included as a type of involuntary proceeding.

### **§23.105 How do I contact a Tribe under the regulations in this subpart?**

To contact a Tribe to provide notice or obtain information or verification under the regulations in this subpart, you should direct the notice or inquiry as follows:

(a) Many Tribes designate an agent for receipt of ICWA notices. The BIA publishes a list of Tribes' designated Tribal agents for service of ICWA notice in the FEDERAL REGISTER each year and makes the list available on its Web site at [www.bia.gov](http://www.bia.gov).

(b) For a Tribe without a designated Tribal agent for service of ICWA notice, contact the Tribe to be directed to the appropriate office or individual.

(c) If you do not have accurate contact information for a Tribe, or the Tribe contacted fails to respond to written inquiries, you should seek assistance in contacting the Indian Tribe from the BIA local or regional office or the BIA's Central Office in Washington, DC (see [www.bia.gov](http://www.bia.gov)).

### **§23.106 How does this subpart interact with State and Federal laws?**

(a) The regulations in this subpart provide minimum Federal standards to ensure compliance with ICWA.

(b) Under section 1921 of ICWA, where applicable State or other Federal law provides a higher standard of protection to the rights of the parent or Indian custodian than the protection accorded under the Act, ICWA requires the State or Federal court to apply the higher State or Federal standard.

## **PRETRIAL REQUIREMENTS**

### **§23.107 How should a State court determine if there is reason to know the child is an Indian child?**

(a) State courts must ask each participant in an emergency or voluntary or involuntary child-custody proceeding whether the participant knows or has reason to know that the child is an Indian child. The inquiry is made at the commencement of the proceeding and all responses should be on the record. State courts must instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child.

(b) If there is reason to know the child is an Indian child, but the court does not have sufficient evidence to determine that the child is or is not an "Indian child," the court must:

- (1) Confirm, by way of a report, declaration, or testimony included in 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 in fact a member (or a biological parent is a member and the child is eligible for membership); and
- (2) Treat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an "Indian child" in this part.

(c) A court, upon conducting the inquiry required in paragraph (a) of this section, has reason to know that a child involved in an emergency or child-custody proceeding is an Indian child if:

- (1) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that the child is an Indian child;



- (2) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child;
- (3) The child who is the subject of the proceeding gives the court reason to know he or she is an Indian child;
- (4) The court is informed that the domicile or residence of the child, the child's parent, or the child's Indian custodian is on a reservation or in an Alaska Native village;
- (5) The court is informed that the child is or has been a ward of a Tribal court; or
- (6) The court is informed that either parent or the child possesses an identification card indicating membership in an Indian Tribe.

(d) In seeking verification of the child's status in a voluntary proceeding where a consenting parent evidences, by written request or statement in the record, a desire for anonymity, the court must keep relevant documents pertaining to the inquiry required under this section confidential and under seal. A request for anonymity does not relieve the court, agency, or other party from any duty of compliance with ICWA, including the obligation to verify whether the child is an "Indian child." A Tribe receiving information related to this inquiry must keep documents and information confidential.

**§23.108 Who makes the determination as to whether a child is a member, whether a child is eligible for membership, or whether a biological parent is a member of a Tribe?**

(a) The Indian Tribe of which it is believed the child is a member (or eligible for membership and of which the biological parent is a member) determines whether the child is a member of the Tribe, or whether the child is eligible for membership in the Tribe and a biological parent of the child is a member of the Tribe, except as otherwise provided by Federal or Tribal law.

(b) The determination by a Tribe of whether a child is a member, whether a child is eligible for membership, or whether a biological parent is a member, is solely within the jurisdiction and authority of the Tribe, except as otherwise provided by Federal or Tribal law. The State court may not substitute its own determination regarding a child's membership in a Tribe, a child's eligibility for membership in a Tribe, or a parent's membership in a Tribe.

(c) The State court may rely on facts or documentation indicating a Tribal determination of membership or eligibility for membership in making a judicial determination as to whether the child is an "Indian child." An example of documentation indicating membership is a document issued by the Tribe, such as Tribal enrollment documentation.

**§23.109 How should a State court determine an Indian child's Tribe when the child may be a member or eligible for membership in more than one Tribe?**

(a) If the Indian child is a member or eligible for membership in only one Tribe, that Tribe must be designated as the Indian child's Tribe.

(b) If the Indian child meets the definition of "Indian child" through more than one Tribe, deference should be given to the Tribe in which the Indian child is already a member, unless otherwise agreed to by the Tribes.

(c) If an Indian child meets the definition of “Indian child” through more than one Tribe because the child is a member in more than one Tribe or the child is not a member of but is eligible for membership in more than one Tribe, the court must provide the opportunity in any involuntary child-custody proceeding for the Tribes to determine which should be designated as the Indian child’s Tribe.

- (1) If the Tribes are able to reach an agreement, the agreed-upon Tribe should be designated as the Indian child’s Tribe.
- (2) If the Tribes are unable to reach an agreement, the State court designates, for the purposes of ICWA, the Indian Tribe with which the Indian child has the more significant contacts as the Indian child’s Tribe, taking into consideration:
  - (i) Preference of the parents for membership of the child;
  - (ii) Length of past domicile or residence on or near the reservation of each Tribe;
  - (iii) Tribal membership of the child’s custodial parent or Indian custodian; and
  - (iv) Interest asserted by each Tribe in the child-custody proceeding;
  - (v) Whether there has been a previous adjudication with respect to the child by a court of one of the Tribes; and
  - (vi) Self-identification by the child, if the child is of sufficient age and capacity to meaningfully self-identify.
- (3) A determination of the Indian child’s Tribe for purposes of ICWA and the regulations in this subpart do not constitute a determination for any other purpose.

#### **§23.110 When must a State court dismiss an action?**

Subject to 25 U.S.C. 1919 (Agreements between States and Indian Tribes) and §23.113 (emergency proceedings), the following limitations on a State court’s jurisdiction apply:

(a) The court in any voluntary or involuntary child-custody proceeding involving an Indian child must determine the residence and domicile of the Indian child. If either the residence or domicile is on a reservation where the Tribe exercises exclusive jurisdiction over child-custody proceedings, the State court must expeditiously notify the Tribal court of the pending dismissal based on the Tribe’s exclusive jurisdiction, dismiss the State-court child-custody proceeding, and ensure that the Tribal court is sent all information regarding the Indian child-custody proceeding, including, but not limited to, the pleadings and any court record.

(b) If the child is a ward of a Tribal court, the State court must expeditiously notify the Tribal court of the pending dismissal, dismiss the State-court child-custody proceeding, and ensure that the Tribal court is sent all information regarding the Indian child-custody proceeding, including, but not limited to, the pleadings and any court record.

#### **§23.111 What are the notice requirements for a child-custody proceeding involving an Indian child?**

(a) When a court knows or has reason to know that the subject of an involuntary foster-care-placement or termination-of-parental-rights proceeding is an Indian child, the court must ensure that:

- (1) The party seeking placement promptly sends notice of each such child-custody proceeding (including, but not limited to, any foster-care placement or any termination of parental or custodial rights) in accordance with this section; and
  - (2) An original or a copy of each notice sent under this section is filed with the court together with any return receipts or other proof of service.
- (b) Notice must be sent to:
- (1) Each Tribe where the child may be a member (or eligible for membership if a biological parent is a member) (*see* §23.105 for information on how to contact a Tribe);
  - (2) The child's parents; and
  - (3) If applicable, the child's Indian custodian.
- (c) Notice must be sent by registered or certified mail with return receipt requested. Notice may also be sent via personal service or electronically, but such alternative methods do not replace the requirement for notice to be sent by registered or certified mail with return receipt requested.
- (d) Notice must be in clear and understandable language and include the following:
- (1) The child's name, birthdate, and birthplace;
  - (2) All names known (including maiden, married, and former names or aliases) of the parents, the parents' birthdates and birthplaces, and Tribal enrollment numbers if known;
  - (3) If known, the names, birthdates, birthplaces, and Tribal enrollment information of other direct lineal ancestors of the child, such as grandparents;
  - (4) The name of each Indian Tribe in which the child is a member (or may be eligible for membership if a biological parent is a member);
  - (5) A copy of the petition, complaint, or other document by which the child-custody proceeding was initiated and, if a hearing has been scheduled, information on the date, time, and location of the hearing;
  - (6) Statements setting out:
    - (i) The name of the petitioner and the name and address of petitioner's attorney;
    - (ii) The right of any parent or Indian custodian of the child, if not already a party to the child-custody proceeding, to intervene in the proceedings.
    - (iii) The Indian Tribe's right to intervene at any time in a State-court proceeding for the foster-care placement of or termination of parental rights to an Indian child.
    - (iv) That, if the child's parent or Indian custodian is unable to afford counsel based on a determination of indigency by the court, the parent or Indian custodian has the right to court-appointed counsel.
    - (v) The right to be granted, upon request, up to 20 additional days to prepare for the child-custody proceedings.
    - (vi) The right of the parent or Indian custodian and the Indian child's Tribe to petition the court for transfer of the foster-care-placement or termination-of-parental-rights proceeding to Tribal court as provided by 25 U.S.C. 1911 and §23.115.

- (vii) The mailing addresses and telephone numbers of the court and information related to all parties to the child-custody proceeding and individuals notified under this section.
- (viii) The potential legal consequences of the child-custody proceedings on the future parental and custodial rights of the parent or Indian custodian.
- (ix) That all parties notified must keep confidential the information contained in the notice and the notice should not be handled by anyone not needing the information to exercise rights under ICWA.

(e) If the identity or location of the child's parents, the child's Indian custodian, or the Tribes in which the Indian child is a member or eligible for membership cannot be ascertained, but there is reason to know the child is an Indian child, notice of the child-custody proceeding must be sent to the appropriate Bureau of Indian Affairs Regional Director (see [www.bia.gov](http://www.bia.gov)). To establish Tribal identity, as much information as is known regarding the child's direct lineal ancestors should be provided. The Bureau of Indian Affairs will not make a determination of Tribal membership but may, in some instances, be able to identify Tribes to contact.

(f) If there is a reason to know that a parent or Indian custodian possesses limited English proficiency and is therefore not likely to understand the contents of the notice, the court must provide language access services as required by Title VI of the Civil Rights Act and other Federal laws. To secure such translation or interpretation support, a court may contact or direct a party to contact the Indian child's Tribe or the local BIA office for assistance in locating and obtaining the name of a qualified translator or interpreter.

(g) If a parent or Indian custodian of an Indian child appears in court without an attorney, the court must inform him or her of his or her rights, including any applicable right to appointed counsel, right to request that the child-custody proceeding be transferred to Tribal court, right to object to such transfer, right to request additional time to prepare for the child-custody proceeding as provided in §23.112, and right (if the parent or Indian custodian is not already a party) to intervene in the child-custody proceedings.

### **§23.112 What time limits and extensions apply?**

(a) No foster-care-placement or termination-of-parental-rights proceeding may be held until at least 10 days after receipt of the notice by the parent (or Indian custodian) and by the Tribe (or the Secretary). The parent, Indian custodian, and Tribe each have a right, upon request, to be granted up to 20 additional days from the date upon which notice was received to prepare for participation in the proceeding.

(b) Except as provided in 25 U.S.C. 1922 and §23.113, no child-custody proceeding for foster-care placement or termination of parental rights may be held until the waiting periods to which the parents or Indian custodians and to which the Indian child's Tribe are entitled have expired, as follows:

- (1) 10 days after each parent or Indian custodian (or Secretary where the parent or Indian custodian is unknown to the petitioner) has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and §23.111;

- (2) 10 days after the Indian child's Tribe (or the Secretary if the Indian child's Tribe is unknown to the party seeking placement) has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and §23.111;
- (3) Up to 30 days after the parent or Indian custodian has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and §23.111, if the parent or Indian custodian has requested up to 20 additional days to prepare for the child-custody proceeding as provided in 25 U.S.C. 1912(a) and §23.111; and
- (4) Up to 30 days after the Indian child's Tribe has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and §23.111, if the Indian child's Tribe has requested up to 20 additional days to prepare for the child-custody proceeding.

(c) Additional time beyond the minimum required by 25 U.S.C. 1912 and §23.111 may also be available under State law or pursuant to extensions granted by the court.

### **§23.113 What are the standards for emergency proceedings involving an Indian child?**

(a) Any emergency removal or placement of an Indian child under State law must terminate immediately when the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

(b) The State court must:

- (1) Make a finding on the record that the emergency removal or placement is necessary to prevent imminent physical damage or harm to the child;
- (2) Promptly hold a hearing on whether the emergency removal or placement continues to be necessary whenever new information indicates that the emergency situation has ended; and
- (3) At any court hearing during the emergency proceeding, determine whether the emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.
- (4) Immediately terminate (or ensure that the agency immediately terminates) the emergency proceeding once the court or agency possesses sufficient evidence to determine that the emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

(c) An emergency proceeding can be terminated by one or more of the following actions:

- (1) Initiation of a child-custody proceeding subject to the provisions of ICWA;
- (2) Transfer of the child to the jurisdiction of the appropriate Indian Tribe; or
- (3) Restoring the child to the parent or Indian custodian.

(d) A petition for a court order authorizing the emergency removal or continued emergency placement, or its accompanying documents, should contain a statement of the risk of imminent physical damage or harm to the Indian child and any evidence that the emergency removal or placement continues to be necessary to prevent such imminent physical damage or harm to the child. The petition or its accompanying documents should also contain the following information:

- (1) The name, age, and last known address of the Indian child;
- (2) The name and address of the child's parents and Indian custodians, if any;

- (3) The steps taken to provide notice to the child's parents, custodians, and Tribe about the emergency proceeding;
  - (4) If the child's parents and Indian custodians are unknown, a detailed explanation of what efforts have been made to locate and contact them, including contact with the appropriate BIA Regional Director (see *www.bia.gov*);
  - (5) The residence and the domicile of the Indian child;
  - (6) If either the residence or the domicile of the Indian child is believed to be on a reservation or in an Alaska Native village, the name of the Tribe affiliated with that reservation or village;
  - (7) The Tribal affiliation of the child and of the parents or Indian custodians;
  - (8) A specific and detailed account of the circumstances that led the agency responsible for the emergency removal of the child to take that action;
  - (9) If the child is believed to reside or be domiciled on a reservation where the Tribe exercises exclusive jurisdiction over child-custody matters, a statement of efforts that have been made and are being made to contact the Tribe and transfer the child to the Tribe's jurisdiction; and
  - (10) A statement of the efforts that have been taken to assist the parents or Indian custodians so the Indian child may safely be returned to their custody.
- (e) An emergency proceeding regarding an Indian child should not be continued for more than 30 days unless the court makes the following determinations:
- (1) Restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm;
  - (2) The court has been unable to transfer the proceeding to the jurisdiction of the appropriate Indian Tribe; and
  - (3) It has not been possible to initiate a "child-custody proceeding" as defined in §23.2.

#### **§23.114 What are the requirements for determining improper removal?**

(a) If, in the course of any child-custody proceeding, any party asserts or the court has reason to believe that the Indian child may have been improperly removed from the custody of his or her parent or Indian custodian, or that the Indian child has been improperly retained (such as after a visit or other temporary relinquishment of custody), the court must expeditiously determine whether there was improper removal or retention.

(b) If the court finds that the Indian child was improperly removed or retained, the court must terminate the proceeding and the child must be returned immediately to his or her parent or Indian custodian, unless returning the child to his parent or Indian custodian would subject the child to substantial and immediate danger or threat of such danger.

### **PETITIONS TO TRANSFER TO TRIBAL COURT**

#### **§23.115 How are petitions for transfer of a proceeding made?**

(a) Either parent, the Indian custodian, or the Indian child's Tribe may request, at any time, orally on the record or in writing, that the State court transfer a foster-care or termination-of-parental-rights proceeding to the jurisdiction of the child's Tribe.

(b) The right to request a transfer is available at any stage in each foster-care or termination-of-parental-rights proceeding.

**§23.116 What happens after a petition for transfer is made?**

Upon receipt of a transfer petition, the State court must ensure that the Tribal court is promptly notified in writing of the transfer petition. This notification may request a timely response regarding whether the Tribal court wishes to decline the transfer.

**§23.117 What are the criteria for ruling on transfer petitions?**

Upon receipt of a transfer petition from an Indian child's parent, Indian custodian, or Tribe, the State court must transfer the child-custody proceeding unless the court determines that transfer is not appropriate because one or more of the following criteria are met:

- (a) Either parent objects to such transfer;
- (b) The Tribal court declines the transfer; or
- (c) Good cause exists for denying the transfer.

**§23.118 How is a determination of “good cause” to deny transfer made?**

(a) If the State court believes, or any party asserts, that good cause to deny transfer exists, the reasons for that belief or assertion must be stated orally on the record or provided in writing on the record and to the parties to the child-custody proceeding.

(b) Any party to the child-custody proceeding must have the opportunity to provide the court with views regarding whether good cause to deny transfer exists.

(c) In determining whether good cause exists, the court must not consider:

- (1) Whether the foster-care or termination-of-parental-rights 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;
- (2) Whether there have been prior proceedings involving the child for which no petition to transfer was filed;
- (3) Whether transfer could affect the placement of the child;
- (4) The Indian child's cultural connections with the Tribe or its reservation; or
- (5) Socioeconomic conditions or any negative perception of Tribal or BIA social services or judicial systems.

(d) The basis for any State-court decision to deny transfer should be stated orally on the record or in a written order.

**§23.119 What happens after a petition for transfer is granted?**

(a) If the Tribal court accepts the transfer, the State court should expeditiously provide the Tribal court with all records related to the proceeding, including, but not limited to, the pleadings and any court record.

(b) The State court should work with the Tribal court to ensure that the transfer of the custody of the Indian child and of the proceeding is accomplished smoothly and in a way that minimizes the disruption of services to the family.

**ADJUDICATION OF INVOLUNTARY PROCEEDINGS**

**§23.120 How does the State court ensure that active efforts have been made?**

(a) Prior to ordering an involuntary foster-care placement or termination of parental rights, the court must conclude that active efforts have been made to prevent the breakup of the Indian family and that those efforts have been unsuccessful.

(b) Active efforts must be documented in detail in the record.

**§23.121 What are the applicable standards of evidence?**

(a) The court must not order a foster-care placement of an Indian child unless clear and convincing evidence is presented, including the testimony of one or more qualified expert witnesses, demonstrating 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.

(b) The court must not order a termination of parental rights for an Indian child unless evidence beyond a reasonable doubt is presented, including the testimony of one or more qualified expert witnesses, demonstrating 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.

(c) For a foster-care placement or termination of parental rights, 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.

(d) Without a causal relationship identified in paragraph (c) of this section, 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 constitute clear and convincing evidence or evidence beyond a reasonable doubt that continued custody is likely to result in serious emotional or physical damage to the child.

**§23.122 Who may serve as a qualified expert witness?**

(a) A 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 and 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 Indian child's Tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's Tribe.

(b) The court or any party may request the assistance of the Indian child's Tribe or the BIA office serving the Indian child's Tribe in locating persons qualified to serve as expert witnesses.

(c) The social worker regularly assigned to the Indian child may not serve as a qualified expert witness in child-custody proceedings concerning the child.

**§23.123 [Reserved]**

**VOLUNTARY PROCEEDINGS**

**§23.124 What actions must a State court undertake in voluntary proceedings?**



(a) The State court must require the participants in a voluntary proceeding to state on the record whether the child is an Indian child, or whether there is reason to believe the child is an Indian child, as provided in §23.107.

(b) If there is reason to believe the child is an Indian child, the State court must ensure that the party seeking placement has taken all reasonable steps to verify the child's status. This may include contacting the Tribe of which it is believed the child is a member (or eligible for membership and of which the biological parent is a member) to verify the child's status. As described in §23.107, where a consenting parent requests anonymity, a Tribe receiving such information must keep relevant documents and information confidential.

(c) State courts must ensure that the placement for the Indian child complies with §§23.129-23.132.

### **§23.125 How is consent obtained?**

(a) A parent's or Indian custodian's consent to a voluntary termination of parental rights or to a foster-care, preadoptive, or adoptive placement must be executed in writing and recorded before a court of competent jurisdiction.

(b) Prior to accepting the consent, the court must explain to the parent or Indian custodian:

(1) The terms and consequences of the consent in detail; and

(2) The following limitations, applicable to the type of child-custody proceeding for which consent is given, on withdrawal of consent:

(i) For consent to foster-care placement, the parent or Indian custodian may withdraw consent for any reason, at any time, and have the child returned; or

(ii) For consent to termination of parental rights, the parent or Indian custodian may withdraw consent for any reason, at any time prior to the entry of the final decree of termination and have the child returned; or

(iii) For consent to an adoptive placement, the parent or Indian custodian may withdraw consent for any reason, at any time prior to the entry of the final decree of adoption, and have the child returned.

(c) The court must certify that the terms and consequences of the consent were explained on the record in detail in English (or the language of the parent or Indian custodian, if English is not the primary language) and were fully understood by the parent or Indian custodian.

(d) Where confidentiality is requested or indicated, execution of consent need not be made in a session of court open to the public but still must be made before a court of competent jurisdiction in compliance with this section.

(e) A consent given prior to, or within 10 days after, the birth of an Indian child is not valid.

### **§23.126 What information must a consent document contain?**

(a) If there are any conditions to the consent, the written consent must clearly set out the conditions.

(b) A written consent to foster-care placement should contain, in addition to the information specified in paragraph (a) of this section, the name and birthdate of the Indian child; the name of the Indian child's Tribe; the Tribal enrollment number for the parent and for the Indian child,

where known, or some other indication of the child's membership in the Tribe; the name, address, and other identifying information of the consenting parent or Indian custodian; the name and address of the person or entity, if any, who arranged the placement; and the name and address of the prospective foster parents, if known at the time.

**§23.127 How is withdrawal of consent to a foster-care placement achieved?**

(a) The parent or Indian custodian may withdraw consent to voluntary foster-care placement at any time.

(b) To withdraw consent, the parent or Indian custodian must file a written document with the court or otherwise testify before the court. Additional methods of withdrawing consent may be available under State law.

(c) When a parent or Indian custodian withdraws consent to a voluntary foster-care placement, the court must ensure that the Indian child is returned to that parent or Indian custodian as soon as practicable.

**§23.128 How is withdrawal of consent to a termination of parental rights or adoption achieved?**

(a) A parent may withdraw consent to voluntary termination of parental rights at any time prior to the entry of a final decree of termination.

(b) A parent or Indian custodian may withdraw consent to voluntary adoption at any time prior to the entry of a final decree of adoption.

(c) To withdraw consent prior to the entry of a final decree of adoption, the parent or Indian custodian must file a written document with the court or otherwise testify before the court. Additional methods of withdrawing consent may be available under State law.

(d) The court in which the withdrawal of consent is filed must promptly notify the person or entity who arranged any voluntary preadoptive or adoptive placement of such filing, and the Indian child must be returned to the parent or Indian custodian as soon as practicable.

**DISPOSITIONS**

**§23.129 When do the placement preferences apply?**

(a) In any preadoptive, adoptive, or foster-care placement of an Indian child, the placement preferences specified in §23.130 and §23.131 apply.

(b) Where a consenting parent requests anonymity in a voluntary proceeding, the court must give weight to the request in applying the preferences.

(c) The placement preferences must be applied in any foster-care, preadoptive, or adoptive placement unless there is a determination on the record that good cause under §23.132 exists to not apply those placement preferences.

**§23.130 What placement preferences apply in adoptive placements?**

(a) In any adoptive placement of an Indian child under State law, where the Indian child's Tribe has not established a different order of preference under paragraph (b) of this section, preference must be given in descending order, as listed below, to placement of the child with:

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

(b) 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.

(c) The court must, where appropriate, also consider the placement preference of the Indian child or Indian child's parent.

### **§23.131 What placement preferences apply in foster-care or preadoptive placements?**

(a) In any foster-care or preadoptive placement of an Indian child under State law, including changes in foster-care or preadoptive placements, the child must be placed in the least-restrictive setting that:

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

(b) In any foster-care or preadoptive placement of an Indian child under State law, where the Indian child's Tribe has not established a different order of preference under paragraph (c) of this section, preference must be given, in descending order as listed below, to placement of the child with:

- (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.

(c) 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, so long as the placement is the least-restrictive setting appropriate to the particular needs of the Indian child, as provided in paragraph (a) of this section.

(d) The court must, where appropriate, also consider the preference of the Indian child or the Indian child's parent.

### **§23.132 How is a determination of “good cause” to depart from the placement preferences made?**

(a) If any party asserts that good cause not to follow the placement preferences exists, the reasons for that belief or assertion must be stated orally on the record or provided in writing to the parties to the child-custody proceeding and the court.

(b) The party seeking departure from the placement preferences should bear the burden of proving by clear and convincing evidence that there is “good cause” to depart from the placement preferences.

(c) A court's determination of good cause to depart from the placement preferences must be made on the record or in writing and 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;
- (4) The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live;
- (5) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, 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 in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.

(d) A placement may not depart from the preferences based on the socioeconomic status of any placement relative to another placement.

(e) 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.

## ACCESS

### **§23.133 Should courts allow participation by alternative methods?**

If it possesses the capability, the court should allow alternative methods of participation in State-court child-custody proceedings involving an Indian child, such as participation by telephone, videoconferencing, or other methods.

### **§23.134 Who has access to reports and records during a proceeding?**

Each party to an emergency proceeding or a foster-care-placement or termination-of-parental-rights proceeding under State law 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 with respect to such action may be based.

### **§23.135 [Reserved]**

## POST-TRIAL RIGHTS & RESPONSIBILITIES

### **§23.136 What are the requirements for vacating an adoption based on consent having been obtained through fraud or duress?**

(a) Within two years after a final decree of adoption of any Indian child by a State court, or within any longer period of time permitted by the law of the State, the State court may invalidate the voluntary adoption upon finding that the parent's consent was obtained by fraud or duress.

(b) Upon the parent's filing of a petition to vacate the final decree of adoption of the parent's Indian child, the court must give notice to all parties to the adoption proceedings and the Indian child's Tribe and must hold a hearing on the petition.

(c) Where the court finds that the parent's consent was obtained through fraud or duress, the court must vacate the final decree of adoption, order the consent revoked, and order that the child be returned to the parent.

### **§23.137 Who can petition to invalidate an action for certain ICWA violations?**

(a) Any of the following may petition any court of competent jurisdiction to invalidate an action for foster-care placement or termination of parental rights under state law where it is alleged that 25 U.S.C. 1911, 1912, or 1913 has been violated:

- (1) An Indian child who is or was the subject of any action for foster-care placement or termination of parental rights;
- (2) A parent or Indian custodian from whose custody such child was removed; and
- (3) The Indian child's Tribe.

(b) Upon a showing that an action for foster-care placement or termination of parental rights violated any provision of 25 U.S.C. 1911, 1912, or 1913, the court must determine whether it is appropriate to invalidate the action.

(c) To petition for invalidation, there is no requirement that the petitioner's rights under ICWA were violated; rather, a petitioner may challenge the action based on any violations of 25 U.S.C. 1911, 1912, or 1913 during the course of the child-custody proceeding.

### **§23.138 What are the rights to information about adoptees' Tribal affiliations?**

Upon application by an Indian who has reached age 18 who was the subject of an adoptive placement, the court that entered the final decree of adoption must inform such individual of the Tribal affiliations, if any, of the individual's biological parents and provide such other information necessary to protect any rights, which may include Tribal membership, resulting from the individual's Tribal relationship.

### **§23.139 Must notice be given of a change in an adopted Indian child's status?**

(a) If an Indian child has been adopted, the court must notify, by registered or certified mail with return receipt requested, the child's biological parent or prior Indian custodian and the Indian child's Tribe whenever:

- (1) A final decree of adoption of the Indian child has been vacated or set aside; or
- (2) The adoptive parent has voluntarily consented to the termination of his or her parental rights to the child.

(b) The notice must state the current name, and any former name, of the Indian child, inform the recipient of the right to petition for return of custody of the child, and provide sufficient information to allow the recipient to participate in any scheduled hearings.

(c) A parent or Indian custodian may waive his or her right to such notice by executing a written waiver of notice and filing the waiver with the court.

- (1) Prior to accepting the waiver, the court must explain the consequences of the waiver and explain how the waiver may be revoked.
- (2) The court must certify that the terms and consequences of the waiver and how the waiver may be revoked were explained in detail in English (or the language of the parent or Indian custodian, if English is not the primary language), and were fully understood by the parent or Indian custodian.
- (3) Where confidentiality is requested or indicated, execution of the waiver need not be made in a session of court open to the public but still must be made before a court of competent jurisdiction in compliance with this section.
- (4) The biological parent or Indian custodian may revoke the waiver at any time by filing with the court a written notice of revocation.
- (5) A revocation of the right to receive notice does not affect any child-custody proceeding that was completed before the filing of the notice of revocation.

## **RECORDKEEPING**

### **§23.140 What information must States furnish to the Bureau of Indian Affairs?**

(a) Any State court entering a final adoption decree or order in any voluntary or involuntary Indian-child adoptive placement must furnish a copy of the decree or order within 30 days to the Bureau of Indian Affairs, Chief, Division of Human Services, 1849 C Street NW., Mail Stop 4513 MIB, Washington, DC 20240, along with the following information, in an envelope marked "Confidential":

- (1) Birth name and birthdate of the Indian child, and Tribal affiliation and name of the Indian child after adoption;
- (2) Names and addresses of the biological parents;
- (3) Names and addresses of the adoptive parents;
- (4) Name and contact information for any agency having files or information relating to the adoption;
- (5) Any affidavit signed by the biological parent or parents asking that their identity remain confidential; and
- (6) Any information relating to Tribal membership or eligibility for Tribal membership of the adopted child.

(b) If a State agency has been designated as the repository for all State-court adoption information and is fulfilling the duties described in paragraph (a) of this section, the State courts in that State need not fulfill those same duties.

### **§23.141 What records must the State maintain?**

(a) The State must maintain a record of every voluntary or involuntary foster-care, preadoptive, and adoptive placement of an Indian child and make the record available within 14 days of a request by an Indian child's Tribe or the Secretary.

(b) The record must contain, at a minimum, the petition or complaint, all substantive orders entered in the child-custody proceeding, the complete record of the placement determination (including, but not limited to, the findings in the court record and the social worker's statement),

and, if the placement departs from the placement preferences, detailed documentation of the efforts to comply with the placement preferences.

(c) A State agency or agencies may be designated to be the repository for this information. The State court or agency should notify the BIA whether these records are maintained within the court system or by a State agency.

### **§23.142 How does the Paperwork Reduction Act affect this subpart?**

The collections of information contained in this part have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned OMB Control Number 1076-0186. Response is required to obtain a benefit. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless the form or regulation requesting the information displays a currently valid OMB Control Number. Send comments regarding this collection of information, including suggestions for reducing the burden, to the Information Collection Clearance Officer—Indian Affairs, 1849 C Street NW., Washington, DC 20240.

### **EFFECTIVE DATE**

### **§23.143 How does this subpart apply to pending proceedings?**

None of the provisions of this subpart affects a proceeding under State law for foster-care placement, termination of parental rights, preadoptive placement, or adoptive placement that was initiated prior to December 12, 2016, but the provisions of this subpart apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

### **SEVERABILITY**

### **§23.144 What happens if some portion of this part is held to be invalid by a court of competent jurisdiction?**

If any portion of this part is determined to be invalid by a court of competent jurisdiction, the other portions of the part remain in effect. For example, the Department has considered separately whether the provisions of this part apply to involuntary and voluntary proceedings; thus, if a particular provision is held to be invalid as to one type of proceeding, it is the Department's intent that it remains valid as to the other type of proceeding.