

DSS Policy and Procedure Guide

Division 03: Child Welfare

Chapter 04: Ongoing Case Management/Practice

Item 021: **Indian Child Welfare Act (ICWA) Expectations in Family Reunification and Permanency Planning**

Suggested changes send to: [DSS PSOA Mailbox](#)

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References: [Indian Child Welfare Act](#) (25 U.S.C. § 1901 et seq.); [Senate Bill 678](#); Division 31 Manual of Policies and Procedures Sections [31-515 and 31-520.121\(a\) through \(d\)](#); [Welfare an Institutions Code §224.3](#); [ACL 10-47](#); [ACIN I-42-12](#); PPG 03-03-003; PPG 03-08-009; [DSS ICWA Folder](#); Bureau of Indian Affairs ([BIA](#)) [Guidelines](#)

Revisions in Red

Replaces Issue: November 19, 2008

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Preamble

Child Welfare Policy and Procedure Guides are meant to be used as tools to relay best practice and staff expectations. It is understood that specific case scenarios may not always align themselves with the stated practices and that at all times what is of paramount importance is the Safety and Well-being of the children we are charged to protect.

Policy

It is the policy of the Department of Social Services (DSS) that DSS Child Welfare staff shall comply with the **federal requirements** of the Indian Child Welfare Act ([ICWA](#)), [Senate Bill \(SB\) 678](#), [BIA Guidelines](#), and California Rules of Court [5.480 to 5.487](#) in all cases involving a Native American child who is or may be a member of or eligible for membership in a federally recognized tribe. In the spirit of the ICWA, DSS Child Welfare staff shall also collaborate with all non-federally recognized tribes or Native American children who are not eligible for membership in a tribe.

Purpose

To inform DSS Child Welfare staff of the requirements of the [ICWA](#) and DSS ICWA policies, procedures and expectations to ensure that current social work practice represents the core value of the [ICWA](#): to protect the best interests of Native American children and to promote the stability and security of Native American tribes and families by preserving the parent-child relationship, and the child's relationship with his or her tribe.

Background Information

Congress passed the [ICWA](#) in 1978 to protect the best interests of **Native American** children and to promote the stability and security of **Native American** tribes and families by establishing specific standards that must be met before a **Native American** child may be removed from his or her family or placed in an adoptive or foster care placement. In 2006, California passed [SB 678](#), which enhanced the various provisions of the [ICWA](#) and put them into state law.

It is important to remember that each tribe is considered a sovereign nation, as they exercise power over people, property, and events within their tribe. Therefore, when collaborating with Tribal Designees, it can be likened to collaborating with Heads of State.

Definitions

Indian Child: For the purposes of the [ICWA \(federal law\)](#), a **Native American child**, or “Indian child”, is defined as “any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.” ([25 U.S. Code § 1903](#)) In the spirit of the law, DSS goes beyond the [ICWA](#) provisions to include any child whose family identifies as Native American.

Note: According to California law, if a youth chooses to become a Non-Minor Dependent (NMD), as an adult the NMD determines whether or not to maintain the distinction of being an “Indian child.” ([Welfare and Institutions Code \(WIC\) 224.1\(b\)](#))

Parent: “Parent means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established” (alleged fathers). ([25 U.S. Code § 1903](#))

Indian Custodian: “Indian custodian means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child.” ([25 U.S. Code § 1903](#))

Indian Tribe: “Indian tribe means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary” of the Interior (federal government) “because of their status as Indians”, including any Alaska Native village composed of twenty-five or more Alaskan Natives as of 1970. ([25 U.S. Code § 1903](#)) In the spirit of the law, DSS goes beyond the [ICWA](#) provisions to include any non-federally recognized tribes.

Indian Child Custody Proceeding: “Indian child custody proceeding” according to [ICWA](#) means and includes any **Juvenile Dependency Court** hearing “where the parent or Indian custodian cannot have the child returned upon demand”, results in “termination” of parental rights, or the “permanent placement of an Indian child for adoption”. “Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.” ([25 U.S. Code § 1903](#))

Active Efforts: Active efforts are distinguished from reasonable efforts in that **DSS staff** must consider the prevailing social and cultural conditions and way of life of the child's tribe. Active efforts are also to be tailored to the specific needs of the family as well as the unique cultural considerations specific to the child's tribe. All available resources are to be used, including the extended family, the child's tribe, and **Native American** social services. A rule of thumb is that "active efforts" is to engage the family while "reasonable efforts" simply offers referrals to the family, and leaves it to them to seek out assistance. **Active efforts may also mean utilizing services not traditionally referred to by staff.** [[25 U.S. Code § 1912\(d\)](#)], [[ACIN I-40-10](#)], [[WIC 361.7\(b\)](#)], [[California Judges Benchguide](#)]

Expert Witness: An expert witness testifies as to whether continued custody of a child by the parent or "Indian Custodian" is likely to cause the child serious emotional or physical damage. Per Federal Law [25 U.S. Code § 1912\(e\)](#), "*no foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, 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*". **Expert witnesses typically testify at the Disposition hearing and any time DSS recommends termination of parental rights.**

Tribal Customary Adoption (TCA): Adoption for a Native American child where the parental rights are altered rather than terminated. TCA is another option as a concurrent/permanent plan for a Native American child. However, it is the decision of the child's tribe (as opposed to DSS) to select TCA in order for this to be a valid concurrent/permanent plan. If selected, the tribe also decides on the modified relationship between the Native American child and their parent(s) or custodian(s). ([ACL 10-47](#)) Although initially scheduled to end on January 1, 2014, [Senate Bill \(SB\) 1013](#) repealed the sunset date.

Procedure

Family Reunification

For **ICWA** cases transferring from the Emergency Response (**ER**) Division to the Family Reunification (**FR**) Division, the families will be assigned to a **DSS ICWA Specialist Social Worker (SW)**.

- Should an **FR SW** discover possible Native American ancestry after being assigned a case, the **SW** shall have the parent complete the [ICWA-020](#) form and forward the form to the Office Assistant (**OA**) for processing.
- The **FR SW** shall consult with their Social Work Supervisor (**SWS**) regarding transferring the case to a **DSS ICWA Specialist**.

The **DSS ICWA Specialist** shall follow up in contacting the Tribal **ICWA Designee** about the appointment of an expert witness for the case.

- If the tribe does not respond with who they would like as an expert witness within 30 days, the assigned **SW** shall send the tribe a [letter](#) requesting their decision within the next 15 days.

- If the tribe does not respond within 15 days to the [letter](#), an expert witness will be selected by the assigned SW from a list maintained by DSS.
- Children belonging to non-federally recognized tribes do not require an expert witness.

Once an expert witness has been selected, the DSS ICWA Specialist will provide the expert witness with all needed materials as required under ICWA law, which includes all discovery, reports, etc. that would be sent to counsel.

The DSS ICWA Specialist shall discuss the following with the expert witness and narrate the discussion in CWS/CMS:

- Ask the expert witness to provide their resume/VITAE, if they have one, for DSS records.
- If the expert witness does not have a resume/VITAE, explain to DSS ICWA Specialist what qualifies them as an expert witness (i.e. they are a tribal elder, are a member of the tribe and have children of their own, etc.)
- Advise the expert witness that their professional opinion is needed as to the following ([ACIN I-40-10](#)):
 - Whether or not “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,” and,
 - Whether or not “active efforts [were] made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts [were] unsuccessful.”
- Advise the expert witness that DSS would like research for their testimony to include contact with the child(ren), parent(s), assigned DSS SW, and child’s tribe (if they are not already a member of the tribe). When possible, contact by the expert witness needs to be face to face.
- Inquire as to whether the expert witness’ testimony will be oral and/or in writing.
 - If in writing, the expert witness will be given the opportunity to provide their report to the DSS ICWA Specialist, who will file it with the Court separate from the DSS Court report. The report and/or cover sheet shall have which Department the hearing is being held in, the date of the hearing, the Court case name, and the Court number.
 - If the expert witness testimony will be given orally, ask if the expert witness will appear in Court or if a Court Call needs to be arranged. Instructions for Court Calls can be found in the DSS ICWA SW Manual.

Note: If the expert witness is giving their testimony via telephone, the DSS ICWA Specialist shall contact County Counsel immediately to determine how to proceed.

- If testimony will not be ready for the Court hearing, advise the DSS ICWA Specialist at least two working days before the hearing of the reason why and when the testimony will be ready. The DSS ICWA Specialist shall advise all parties of this information via email and the Court Officer on the 6141.

Unless there are extenuating circumstances, the same expert witness shall be utilized throughout the Juvenile Court process.

In order for the expert witness to be compensated, the DSS ICWA Specialist shall complete form 65, "CWS Service Plan", which is in CWS/CMS in the green section, and submit the form to their SWS and Program Manager.

The DSS ICWA Specialist shall contact the appropriate Tribal agency in order to ascertain the prevailing social and cultural standards, conditions, child rearing practices and way of life of the Native American child's tribe so as to accurately assess the reunification of the Native American family.

The child's tribe, including the Tribal ICWA Designee, is to be actively engaged and involved in all case planning decisions including culturally appropriate services, staffings, placement changes, Permanency Teaming Meetings (PTMs), Mappings and Court hearings. While it is mandatory pursuant to ICWA that the tribe be allowed to attend Court hearings, attendance at any internal DSS meeting shall be at the discretion of the parents. If the parents do not wish for the Tribal ICWA Designee and/or expert witness to attend any internal DSS meeting, the DSS ICWA Specialist shall consult separately with them.

In the event that the case will be presented at a Bypass Mapping for possibly denying reunification services to the parents, the DSS ICWA Specialist and/or their Supervisor shall consult with the Tribal ICWA Designee and ICWA expert witness as to the active efforts standard, the best interests of the child, the preservation of the parent-child relationship, and the preservation of the child's relationship with his or her tribe. The Tribal ICWA Designee and/or expert witness shall only attend the Bypass Mapping if the parents are in agreement.

In the event that a Native American child is made a dependent of the Court and reunification services are ordered for one or both parents, the DSS ICWA Specialist shall provide reunification services that utilize the available resources of the Native American child's extended family, tribe, tribal and other Native American social service agencies, and individual Native American caregiver service providers.

The DSS ICWA Specialist shall continue to provide active efforts in order to reunify the Native American family and preserve the child-tribe relationship. Active efforts are to be tailored to the unique needs of the family and incorporate the prevailing social and cultural standards and child rearing practices of the child's tribe.

The DSS ICWA Specialist shall thoroughly document the provision of active efforts to preserve the parent-child relationship, and maintain the child's continuing relationship with his or her Native American community in the Contact narrative section of CWS/CMS.

The DSS ICWA Specialist shall consult with and/or provide the tribe with information regarding TCA at every step throughout the case as part of concurrent planning. This shall be documented in the CWS/CMS contact narratives and all Court reports.

Permanency Planning

While FR has specific SWs designated as DSS ICWA Specialists, Permanency Planning currently does not.

The Case Managing (CM) SW shall continue to collaborate with Tribal ICWA Designee and ensure that the Native American child is being offered the opportunity to engage in relevant Native American-based programs and tribal/Native American community events.

If a parent is offered additional reunification services after a permanent plan is established, referrals should be provided to Native American-based programs and resources.

The child's tribe, including the Tribal ICWA Designee, is to be actively engaged and involved in all case planning decisions including culturally appropriate services, staffings, placement changes, Permanency Teaming Meetings (PTMs), Mappings and Court hearings. While it is mandatory pursuant to ICWA that the tribe be allowed to attend Court hearings, attendance at any internal DSS meeting shall be at the discretion of the parents. If the parents do not wish for the Tribal ICWA Designee and/or expert witness to attend any internal DSS meeting, the DSS ICWA Specialist shall consult separately with them.

All Native American-related activities and referrals shall be documented in CWS/CMS contact narratives and Court reports.

Placement

25 U.S. Code § 1915 specifies the placement preferences for Indian children who will be placed in foster care or a pre-adoptive placement. (Refer to [PPG 03-05-017](#), "Relative and Non-Relative Extended Family Member Caregivers" and [PPG 03-05-019](#), "Trially Approved Foster Homes".) Unless the Court has made a judicial finding of "good cause to the contrary" or the child's tribe establishes a different order of preference by resolution, the order of placement preference shall be as follows:

- A member of the Native American child's extended family.
- A foster home licensed, approved, or specified by the Native American child's tribe.
- A Native American foster home licensed or approved by an authorized non-Native American licensing authority.
- An institution for children approved by a Native American tribe or operated by a Native American organization which has a program suitable to meet the Native American child's needs.

The following requirements shall also apply when placing **Native American** children in both emergency and non-emergency situations:

- The **CM SW shall** also use the services of the **Native American** child's tribe, whenever available, in seeking to secure placement within the placement preferences delineated above.
- The standards to be applied in **Native American** child placements **shall** be the prevailing social and cultural standards of the **Native American** community in which the parent or extended family member maintains social and cultural ties.
- In any placement of a **Native American** child, the **CM SW shall** select the least restrictive placement which most approximates a family. The **Native American** child **shall** also be placed within reasonable proximity to the child's home, taking into account any special needs of the child.
- When no preferred placement is available as specified in the preferences delineated above, active efforts **shall** be made to place the child with a family committed to enabling the child to have extended family visitation and participation in the cultural, spiritual, religious and ceremonial activities of the child's tribe.

Documentation

Efforts to comply with the placement preference order specified **above**, and any deviations to the order shall be fully explained. The **CM SW shall** document **all efforts to comply with the placement preference order** in the **CWS/CMS** contact **narratives**.

For **Native American** children placed in non-**Native American** homes, active efforts to maintain the child's cultural **heritage** and participation in tribal spiritual and religious ceremonies and activities **shall** be documented, and any **instance of active efforts not made shall** be fully explained. The **CM SW shall** document the efforts in the **CWS/CMS** contact **narratives**.

The placement history **for any Native American child shall** be **made** available to the Secretary of the Interior and/or the **Native American** child's tribe upon request.

Tribal Customary Adoption (TCA) Documentation

Open Existing Case Plan, CP Participant's tab. In the *Case Plan Goal* field, check *Tribal Customary Adoption*.

Open Existing Case Plan Notebook, Identification (ID) Tab. The *Case Plan Update Appropriateness Description* field will be used to document key stages and/or decisions of the **Native American** child's case where TCA is considered. In the *Update Narrative Information*, the user will enter the following as applicable:

- The date a tribe has stated that it agrees that TCA is an appropriate permanency option for the **Native American** child;

- The date the tribe rejects the TCA option, and the reason (if known).

ICWA-020 Documentation

Enter ICWA information in the child’s CWS/CMS Client Notebook ID Page in the “Other Client Information” “ICWA Eligible” Section.

If Native American Ancestry is claimed and the tribe/BIA has not made a conclusive finding under the ICWA, select “Pending”.

If the parent/child do not claim Native American Ancestry, select “No”.

If the parent is not available to ask, select “Not Asked”.

If the tribe/BIA has made a conclusive finding that the ICWA applies, select “Yes”.

Update the Ethnicity if needed – the family will make the determination.

Import the ICWA-020 into CWS/CMS.

In the “Indian Ancestry Notification” area enter the date DSS was informed of Native American Ancestry and select “Fresno”.

Note: See Screen-Shot of CWS/CMS Client Notebook ID Page below:

The screenshot displays the CWS/CMS Client Notebook ID Page interface. At the top is a menu bar with options: File, Edit, Search, Action, Associated, Attach/Detach, Window, Help, and Toolz. Below the menu is a toolbar with various icons. A navigation bar contains tabs: Summary, ID, Demog., Address, Names, Related Clients, ID Num, Juv. Cit. #, Search Log, AFDC-FC, Attorneys, Service Providers, and I.C.W.A. The main content area is divided into several sections:

- Name and Identification:** Includes fields for Prefix, First (Isabella), Middle, Last, Suffix, Name Type (Legal), Gender (Female), Marital Status, SSN, Alien Registration #, Driver's License, Date of Birth, and Age and Age Unit. There are checkboxes for Self Reporter, Client is a Minor Mother, and Outstanding Warrant Exists, along with a Client Number field.
- Other Client Information:** Contains radio buttons for ICWA Eligible (Yes, No, Not Asked, Pending) and Incapacitated Parent (Yes, No, Unknown, Not Applicable). It also has a checkbox for Child has Indian Ancestry.
- Indian Ancestry Notification:** Features a table with columns for County and Date, and a Date Informed field.
- Language:** Includes Primary Language (English) and Secondary Language dropdowns, and a Literate section with radio buttons (Yes, No, Unknown, Not Applicable).
- Race/Ethnicity:** Contains a Specify Race* if known section with Primary Ethnicity (White*) and a dropdown for Unable to Determine - Reason. It also has an Other Ethnicity section with a plus sign and a dropdown.
- Confidentiality:** Includes a checkbox for Confidentiality In Effect and a dropdown for Ineffective Date.
- Safely Surrendered Baby:** Contains a checkbox for This Client has been involved in the Safely Surrendered Baby Program.
- Hispanic or Latino Origin:** Includes radio buttons (Yes, No, Declines to State, Unable to Determine) and a dropdown for Unable to Determine - Reason.

SWs have “an affirmative and continuing duty to inquire” whether a child for whom a petition has been filed is or may be a Native American child. The CM SW has a continuing duty to investigate and provide notice to the tribe(s) and Court if the CM SW subsequently receives information that provides a “reason to know” that a Native American child is involved in the proceedings.

If new information is obtained regarding the child’s Native American ancestry, the tribe, BIA and Secretary of the Interior must be re-noticed with the new information. This must be done even if the Court already found that ICWA does not apply.

Court Reports

Statutory timeframes for notice of Court hearings also applies to tribes. Refer to [PPG 03-06-009](#), “Notice Requirements for a Child Under the Indian Child Welfare Act (ICWA) or an American Indian Child From a Federally Recognized Tribe”

Statutory timeframes for the submittal of Court reports also applies to tribes. Refer to [PPG 03-06-024](#), “Timelines for Reports to Court”.

The **FR ICWA Specialist is responsible for providing** the ICWA Tribal **Designee** with a copy of the **Jurisdiction and Disposition** report at the same time as it is provided to all other parties.

The **FR ICWA Specialist shall** provide the ICWA Tribal **Designee** with all statutory reports (e.g. 6/12/18-month reviews) at the same time it is provided to all other parties.

The **Permanency Planning CM SW shall** provide the ICWA Tribal **Designee** with all statutory reports (e.g. **Post-Permanency** hearings) at the same time it is provided to all other parties.

All **C**ourt reports **shall** have the following information in the ICWA **section**:

- Names and relationships of the individuals reporting the information. **Include information from the [ICWA-020](#), “Parental Notification of Indian Status” form and attach the form to the report, if not attached to a previous report.**
- Date information was provided.
- The tribes contacted and noticed.
- The response of **each** tribe **contacted and noticed**.
- **For Disposition reports, the appropriate ICWA Findings and Orders shall be included in the report and Orders After Hearing.**
- For those cases with an ICWA determination, the date the Court made the ICWA determination.

The **CM SW** shall document all efforts to comply with the placement preference order in each statutory report (e.g. Jurisdiction, Disposition, 6/12/18-month reviews, and Post-Permanency reviews).

Active efforts to maintain the child's cultural heritage and participation in tribal spiritual and religious ceremonies and activities shall be documented in each statutory report (e.g. Jurisdiction, Disposition, 6/12/18-month reviews, and Post-Permanency reviews).

Any statements from the tribe regarding the progression of the case shall be included in the report.

All Court reports from the Disposition report on shall include whether or not a TCA would be an appropriate concurrent or permanent plan for the Native American child. Included in the report will be the tribe's opinion of the appropriateness as well as the DSS' opinion.

Out of State Tribes

For those tribes that are out of state and not able to appear in Court, every effort shall be made to assist the tribe in being an active participant in the Court proceedings.

Accommodations shall be made for out-of-state tribes to make a Court appearance via telephone.

The tribe shall be given an opportunity to state their recommendations for the child in written form, by letter. This letter is to be provided to the Court as an attachment to the Court report.

The **CM SW** is to ask the out-of-state tribe if they would like to connect with a local tribe for information about services in the area, the Court process in California, and/or appear in Court on their behalf. If the out-of-state tribe agrees, the **CM SW** will provide them with local tribe information. This is to facilitate Tribal Council to Tribal Council dialogue so that the tribes can come to an agreement as to how the local tribe can best help the out-of-state tribe.

Non-Federally Recognized Tribes and Non-Eligible Native American Children

In the filing of a petition for a child who is or may be a member of a Native American tribe, identifies himself/herself as a member of a particular Native American organization, or claims Native American heritage, the **CM SW** shall follow the notification procedures outlined in [PPG 03-06-009](#), "Notice Requirements for a Child Under the Indian Child Welfare Act (ICWA) or an American Indian Child From a Federally Recognized Tribe".

If during the ICWA determination the Native American child is not found to meet the ICWA definition of "Indian child" based on the federal status of the child's tribe or because the child is not eligible for membership in the tribe, the **CM SW** shall make an inquiry into the tribe's wishes for continued involvement in the dependency proceedings.

The **CM SW** shall advise the Court of the tribe's wishes for continued involvement. This information is needed for the Court to make a ruling as to [WIC 306.6](#) which allows the tribe to participate in the following, per the discretion of the Court:

- Be present at the hearing.
- Address the Court.
- Request and receive notice of hearings.
- Request to examine Court documents relating to the proceeding.
- Present information to the Court that is relevant to the proceeding.
- Submit written reports and recommendations to the Court.
- Perform other duties and responsibilities as requested or approved by the Court.

The CM SW shall continue to engage and collaborate with the tribe to provide culturally appropriate services and assessments.

Note: *A determination that ICWA does not apply, in and of itself, is not reason to change the family's ethnic identity in CWS/CMS to anything other than American Indian or Alaskan Native.*
The family shall determine their Primary Ethnicity and Other Ethnicity, not DSS staff or the Court.