

DSS Policy and Procedure Guide

Division 03: Child Welfare

Chapter 03: Initial Response/Detention

Item 039: Indian Child Welfare Act (ICWA) Expectations in Emergency Response

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 \(d\)](#); PPG 03-04-021; PPG 03-08-009; [DSS ICWA Folder](#); Bureau of Indian Affairs ([BIA](#)) [Guidelines](#)

Replaces Issue: New

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Preamble

Child Welfare Policy and Procedure Guides (PPG) 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 referrals and 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, 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.

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

Initial Response

As with any Emergency Response (ER) referral, the ER Social Worker (SW) will follow the procedures listed in [PPG 03-03-008](#), “Assessment in Investigation of Abuse/Neglect Reports.”

If while gathering information for a referral Careline staff become aware that a family has or may have Native American ancestry, the referral is to be assigned to a DSS ICWA Specialist.

Prior to responding to an ER referral, the ER SW shall review case and referral history to determine if the family has already been identified as having Native American ancestry and/or a prior ICWA determination.

In the event that a history review finds that a specific tribe has been identified for the family, the responding ER SW shall consult with a DSS ICWA Specialist. The DSS ICWA Specialist will facilitate contact with the child’s Tribal ICWA Designee. The ER SW shall conduct a joint response with the Tribal ICWA Designee, if at all possible.

The ER SW shall distinguish whether the child is in [danger](#) of future harm by their parent(s) or Indian custodian(s) as opposed to the family having difficult [complicating factors](#).

In assessing the safety and possible emergency removal of Native American children, the investigating SW must attempt to prevent the breakup of the Native American family through active efforts by providing rehabilitation and remedial services before removing Native American children from their home. Rehabilitation and remedial services include, but are not limited to, the provision of:

- Parenting classes and education.
- Mental health counseling and services.
- Substance abuse assessments and any recommended treatment.
- Domestic violence classes.

Active efforts shall be made to 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 investigating SW shall also contact the appropriate Tribal agency in order to ascertain the prevailing social and cultural standards and values, conditions and child rearing practices within the Native American child's tribe.

The investigating SW will thoroughly document the provision of active efforts including the offer of all rehabilitation and remedial services and the response to the offers in the Contact narrative section of CWS/CMS pursuant to [PPG 03-01-001](#), "Mandatory Face-to-Face Contacts/Documentation Timeframes".

The child's tribe is to be an active part of the development of any safety plan.

Emergency Situations

Active efforts are not necessary in emergency situations prior to the temporary removal of a Native American child from the home when it is determined that such removal is necessary in order to protect the child from "imminent physical damage or harm" [25 U.S. Code § 1922](#).

When an emergency situation exists and it has been determined that a Native American child must be temporarily removed from the home, the investigating SW shall make immediate efforts to place the child in a Native American home, and shall notify the appropriate Native American tribal agency of the removal in order to solicit tribal assistance and support in the placement of the child.

The DSS ICWA Specialist (if not assigned to the referral) and child's tribe are to be notified as soon as practically possible of all Imminent Risk and Detention Team Decision Making (TDM) meetings held on behalf of the family. Every effort shall be made for the Tribal ICWA Designee to be present. For those tribes that are not local, efforts shall be made for the Tribal ICWA Designee to participate via conference call. It is important to have tribal participation, as the tribe can be a support/resource for the family. If a DSS ICWA Specialist and/or the child's Tribal ICWA Designee is/are unable to attend the TDM meeting, they shall be advised of the outcome within one working day.

- For TDM meetings where it has been decided that the child will be/remain removed, the parents shall be advised of the legal consequences should they not reunify within the statutory time limits (i.e. planned permanent living arrangement, guardianship, TCA).

- Placement preferences shall also be discussed with the parents (see next section).

If a petition is filed on behalf of a Native American child, the Tribal ICWA Designee is to be faxed or emailed a copy of the filed petition and Detention report. The petition and Detention report are to be provided at the same time it is provided to all other parties, including Counsel. 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” for noticing timeframes.

If a Native American child is detained, the investigating SW shall contact the Tribal ICWA Designee and ask if the tribe has a preference as to who to appointment as expert witness for the case. This conversation shall be narrated in CWS/CMS.

Should the tribe choose an expert witness while the case is still in ER, the assigned SW 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.
- Complete form 65, “CWS Service Plan”, which is in CWS/CMS, and submit the form to their Supervisor and Program Manager.

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

Placement

[25 U.S. Code § 1915](#) specifies the placement preferences for Native American 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](#), “Tribally 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. This includes trying to facilitate a rapid placement of the child with a relative and/or mentor.
- A foster home licensed, approved, or specified by the 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 child’s needs.

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

- The investigating 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 investigating SW shall select the least restrictive placement which most approximates a family. The 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.

Petition and Detention Report

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 [ICWA-010](#), "Indian Child Inquiry Attachment", shall be completed by the assigned SW or the Court Specialist and attached to the petition.

Detention Report

The ICWA section shall have the following information:

- Names and relationships of the individuals reporting the information. Include information from the ICWA Inquiry form and the [ICWA-020](#), "Parental Notification of Indian Status" form. Attach only the [ICWA-020](#) form to the report.
- Date the information was provided.
- The tribes contacted and noticed, if applicable.
- The response of each tribe contacted and noticed, if applicable.
- For those cases with a previous ICWA determination, the date the Court made the ICWA determination.

The appropriate ICWA Findings and Orders shall be included in the Detention report and Orders after Hearing.

If the tribe was noticed for the hearing, this shall be included in the Notices section of the Detention report.

The Reasonable Efforts section shall include what active efforts were made by DSS.

Whether or not the ICWA Tribal Designee was present during the investigation shall be included in the Witness Statements/Supporting Evidence section.

Documentation

The investigating SW shall ensure that CWS/CMS case records include the following:

- All Native American child placements shall be clearly documented in CWS/CMS.
- Efforts to comply with the placement preference as previously mentioned in this PPG shall be documented in the CWS/CMS Contact Narratives, and any deviations to the order shall be fully explained.
- For Native American children placed in non-Native American homes, active efforts to maintain the child's cultural heritage, as well as participation in tribal spiritual and religious ceremonies and activities shall be documented in the CWS/CMS Contact Narratives. Any instance of active efforts not made shall be fully explained.
- The placement history for any Native American child shall be made available to the Secretary of the Interior and/or the child's tribe upon request.

ICWA-020 Documentation in CWS/CMS

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 does 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 signed ICWA-020 into CWS/CMS.

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

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

Name and Identification

Client Information

Prefix First Middle Last Suffix Name Type
 Gender Marital Status SSN Alien Registration #
 Driver's License - State/Number Date of Birth or Age and Age Unit
 Self Reporter Client is a Minor Mother Outstanding Warrant Exists Client Number

Other Client Information

ICWA Eligible Incapacitated Parent
 Yes Yes
 No No
 Not Asked Unknown
 Pending Not Applicable
 Child has Indian Ancestry

Indian Ancestry Notification

| + | County | Date |
|---|--------|------|
| | | |

County Date Informed

Language

Primary Language
 Secondary Language
 Literate
 Yes
 No
 Unknown
 Not Applicable

Race/Ethnicity

Specify Race if known
 Primary Ethnicity
 Unable to Determine - Reason
 Other Ethnicity
 + Other Ethnicity

Hispanic or Latino Origin

Yes
 No
 Declines to State
 Unable to Determine
 Unable to Determine - Reason

Confidentiality

Confidentiality In Effect
 Ineffective Date
 Safely Surrendered Baby
 This Client has been involved in the Safely Surrendered Baby Program

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 SW has a continuing duty to investigate and provide notice to the tribe(s) and Court if the 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.

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, including:

- 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 DSS ICWA Specialist is to seek permission from the out-of-state tribe to have a local tribe appear on their behalf. If the out-of-state tribe agrees, the DSS ICWA Specialist 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 what the local tribe's appearance will entail.

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 ancestry, the ER SW shall follow the notification procedures outlined in [PPG 03-04-015](#), "Requesting Confirmation of Child's Status as an Indian".

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 investigating SW shall make an inquiry into the tribe's wishes for continued involvement in the dependency proceedings. If the tribe wishes to remain involved, the Court must grant the continued involvement.

The investigating SW shall advise the Court of the tribe's wishes for continued involvement in the next Court report. 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 investigating 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.*