

## DSS Policy and Procedure Guide

Division 03: Child Welfare

Chapter 08: Adoptions

### Item 010: **Indian Child Welfare Act (ICWA) Expectations in Assessment/Adoptions**

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 \(d\)](#); [ACL 10-47](#); [ACIN I-42-12](#); [PPG 03-03-039](#); [PPG 03-04-021](#); [DSS ICWA Folder](#); Bureau of Indian Affairs 1979 [Guidelines](#) and 2015 [Guidelines](#)

Replaces Issue: New

[Definitions](#) / [Procedure](#) / [TCA](#) / [Placement](#) / [Court Reports](#) / [Documentation](#) / [TCA Documentation](#) / [ICWA-020 Documentation](#) / [Out of State Tribes](#) / [Non-Federally Recognized Tribes and Non-Eligible Native American Children](#)

### **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](#), original 1979 Bureau of Indian Affairs (BIA) [Guidelines](#), revised 2015 [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 their 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 with 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.

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. Examples of active efforts can be found in the [2015 BIA Guidelines](#). [[25 U.S. Code § 1912\(d\)](#), [ACIN I-40-10](#), [WIC 361.7\(b\)](#), [California Judges Bench guide](#)]

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**

For ICWA cases transferring to the Assessment/Adoption Division, every effort shall be made to assign the family to a DSS ICWA Specialist Social Worker (SW). However, if ICWA staff is limited or their caseload is already at the guideline maximum, the family may be assigned to another SW within the same Assessment/Adoption unit.

No plan of adoption is to be made without the consent of the Native American child's tribe.

When recommending termination of parental rights (TPR), testimony by an ICWA expert witness is required. Unless there are extenuating circumstances, the same expert witness used for the Disposition hearing shall be used for the Welfare and Institutions Code (WIC) 366.26 hearing.

The DSS ICWA Specialist will provide the expert witness with all needed materials, which includes all discovery, reports, and any other documents 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.
  - If the same expert witness from the Disposition hearing is being used, ask if they would like to provide an updated resume/vitae.
- 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.). (Only if the expert witness is different from the one used at Disposition.)
- Advise/remind the expert witness that DSS would like research for their declaration to include contact with the child(ren), parent(s), prospective adoptive parent(s), assigned DSS ICWA Specialist, and child's tribe. When possible, contact by the expert witness needs to be face to face.
- Advise DSS ICWA Specialist whether their 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.
  - 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.
  - If the expert witness declaration 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, contact County Counsel immediately, as they will need to obtain a written stipulation from all parties showing no objection.

- Advise the expert witness of the hearing date when their declaration will be needed.
- If the declaration will not be ready for the Court hearing, advise the DSS ICWA Specialist at least five working days before the hearing of the reason why and when the declaration will be ready. The DSS ICWA Specialist shall advise all parties of this information via email and the Court Officer on the 6141 form.
- Advise the expert witness that their professional opinion is needed as to the following ([ACIN I-40-10](#)):
  - Supported by evidence *beyond a reasonable doubt* whether the continued custody of the child by the parent or Native American custodian is likely to result in serious emotional or physical damage to the child.

- Whether or not TPR would substantially interfere with the child’s connection to his or her tribal community or the child’s tribal membership rights.
- Whether or not the child’s tribe has identified guardianship, long-term foster care with a fit and willing relative, or another planned permanent living arrangement for the child.

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 Social Work Supervisor and Program Manager.

### Tribal Customary Adoption (TCA)

Prior to the WIC 366.26 hearing, the DSS ICWA Specialist shall consult with the Native American child’s tribe about whether or not they are still considering TCA as the permanent plan.

Reminder: Only the child’s tribe can choose a permanent plan of TCA, not the DSS.

The results of the consultation shall be included in the WIC 366.26 Court report. The report must include the following:

- An assessment regarding the Native American child’s likelihood of being adopted;
- The DSS ICWA Specialist’s professional opinion if TCA would or would not be detrimental to the Native American child; and
- Whether the Native American child should be returned home to their parent or custodian.

If the Court is in agreement with TCA as the permanent plan, they will make the order without TPR and continue the hearing for up to 120 days for completion of the home study and submission of the Tribal Customary Adoption Order (TCAO).

The tribe is responsible for completion of a home study, either by the tribe or a designee.

- The DSS ICWA Specialist shall consult with the tribe or designee to determine if DSS is needed to help with criminal and child abuse/neglect background checks for the home study.
  - A home study where the applicant, or an adult residing in the applicant’s home, has a conviction in Health & Safety Code section 1522(g)(1)(A)(i), 1522(g)(1)(B), or for physical assault, battery, or a drug-related offense within the last five years, cannot be approved.
- The DSS ICWA Specialist shall request a copy of the home study from the tribe.
- If the tribe is not completing the home study, the DSS ICWA Specialist shall ensure that the tribe receives a copy of the home study.

If the home study is favorable to the tribe, the tribe shall file a TCAO with the Court at least 20 days prior to the continued WIC 366.26 hearing. The TCAO shall establish the legal relationship, responsibilities and privileges between the Native American child and the adoptive family, and the modified legal relationship between the Native American child and the birth parents after the TCA is finalized. The TCAO is based on the tribe's laws and customs. The TCAO must include the following:

- The modification of the legal relationship of the birth parents or custodian and the child after TCA is finalized;
- Contact between the birth parents or custodians and the child;
- Responsibilities of the birth parents or custodians;
- The child's legal relationship with the tribe; and
- The rights of inheritance of the child.

At least seven days prior to the continued WIC 366.26 hearing, the DSS ICWA Specialist will file an Addendum report with the Court. The report shall include:

- The DSS ICWA Specialist's opinion about the prospective TCA including providing a recommendation to the Court on whether DSS is or is not in support of the TCA;
- Continued suitability of TCA being the appropriate plan for the child;
- The recommendation for the approval or denial of the prospective TCA applicant(s). This is contingent on the completion of the home study. If the home study is not complete, the DSS is not responsible for including that information in this report. The DSS is not expected to recommend an approval of an applicant when the home study is not complete or the DSS has not reviewed the home study when completed by the Native American child's tribe. (While information from the home study is used for the Addendum report, the home study is not to be attached to the Addendum report.);
- The results of the full state and federal level adoption specific background checks;
- Any pertinent information gathered during the process, including the TCAO;
- Any updates regarding TCA the agency deems necessary to report to the Court; and
- Any concerns the agency may have with the TCAO.

If the Court is in agreement with the TCAO, the Court will "afford Full Faith and Credit" to the TCAO. "Full Faith and Credit" is a legal concept regarding when and how different sovereigns recognize and enforce each other's Court orders.

The DSS ICWA Specialist shall complete the TCA placement agreement.

The DSS ICWA Specialist shall complete the Adoption Assistance Program (AAP) agreement.

The DSS ICWA Specialist files an adoption petition with the Court on behalf of the Prospective Adoptive Parent (PAP).

Once a Finalization hearing is set, the DSS ICWA Specialist shall file a final report of the facts ([form AD 519](#)) of the proposed TCA with the Court. The report must include all of the same documents and information required in any Finalization report with the exception of documentation that the child is legally freed to finalize an adoption.

### **Placement**

[25 U.S. Code § 1915](#) specifies the placement preferences for Native American children who will be placed in an adoptive placement. 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 child’s extended family.
- Other members of the Native American child’s tribe.
- Other Native American families, including families of unwed individuals.

In the event that a Tribe Certified placement is not possible, every effort shall be made to facilitate a rapid placement of the Native American child with a relative and/or mentor placement. (Refer to [PPG 03-05-017](#), “Relative and Non-Relative Extended Family Member Caregivers” and [PPG 03-05-019](#), “Tribally Approved Foster Homes”.)

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

- 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 DSS ICWA Specialist shall select the least restrictive placement which most approximates a family and allows any special needs of the child to be met. The child shall also be placed within reasonable proximity to the child’s home, extended family, and/or siblings.
- The DSS ICWA Specialist 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.

- 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.

## **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".

All Court 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 those cases with an ICWA determination, the date the Court made the ICWA determination.

The appropriate ICWA Findings and Orders shall be included in the reports and Orders After Hearing.

The DSS ICWA Specialist shall document all efforts to comply with the placement preference order in each statutory report (e.g. WIC 366.26 and Status Review reports).

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. WIC 366.26 and Status Review reports).

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

All Court reports following the Disposition report 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.



## Documentation

All Native American child placements shall be clearly documented in CWS/CMS.

Efforts to comply with the placement preference order specified above, and any deviations to the order shall be fully explained. The DSS ICWA Specialist 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 DSS ICWA Specialist 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 child's tribe upon request.

Import the [ICWA-010](#) into CWS/CMS. This form is usually attached to the original petition.

### 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*, 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 (if not previously entered);
- The date the tribe rejects the TCA option, and the reason (if not previously entered);
- The date the Court referred the case to the tribe to conduct the procedures required under WIC 366.24 (e.g. the TCA home study, the development by the tribe of the TCAO); and
- If the Court refused to give Full Faith and Credit to the tribe's TCA order, the date of the rejection and the reason (if known).

If a Tribal Designee has been chosen by the tribe to conduct the TCA home study, go to the *Open Existing Placement Notebook*. In the *ID* tab, go to the *Rationale* field in the page where there is a check box. Check the box next to *Tribal Designee Consulted* and enter the date the designee agreed to be the tribe's designee/date the tribe advised DSS.

- In the narrative information *Rationale Description* field, specify that this is a TCA case and identify the designee.

When the Court orders Full Faith and Credit for the TCAO go to *Open Existing Family Information Notebook* in the Blue section; in the *Parental Rights* tab, go to the *Tribal Customary Adoption* field in the page. Check the box for *Tribal Customary Adoption Afforded Full Faith and Credit* and enter the date of the Court’s order giving Full Faith and Credit to the tribe’s TCAO.

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 and/or extended family is/are 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” enter 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, there 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 titled "Name and Identification" and contains several sections:

- Client Information:** 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:** Radio buttons for "ICWA Eligible" (Yes, No, Not Asked, Pending) and "Incapacitated Parent" (Yes, No, Unknown, Not Applicable). A checkbox for "Child has Indian Ancestry".
- Indian Ancestry Notification:** A table with columns for County and Date. Below the table are fields for County and Date Informed.
- Language:** Fields for Primary Language (English) and Secondary Language. A section for "Literate" with radio buttons for Yes, No, Unknown, and Not Applicable.
- Race/Ethnicity:** A section titled "Specify Race\* if known" with a dropdown for Primary Ethnicity (White) and a field for "Unable to Determine - Reason". Below this is a section for "Other Ethnicity" with a "+" button and a field for "Other Ethnicity".
- Confidentiality:** A checkbox for "Confidentiality In Effect" and a field for "Ineffective Date".
- Safely Surrendered Baby:** A checkbox for "This Client has been involved in the Safely Surrendered Baby Program".
- Hispanic or Latino Origin:** Radio buttons for Yes, No, Declines to State, and Unable to Determine, along with a field 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 DSS ICWA Specialist 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 heritage, 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. New information can include changes in eligibility with the tribes or previously undisclosed information from the family.

### **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 will be filed by DSS with the Court as a separate 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 heritage, the DSS ICWA Specialist 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 DSS ICWA Specialist shall make an inquiry into the tribe’s wishes for continued involvement in the dependency proceedings.

The DSS ICWA Specialist 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 DSS ICWA Specialist 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.*