



Social Service Departments

Requirements — Indian Child Welfare Act, Federal ICWA Regulations, AB 1325 & AB 3176*

I. Investigation/Intake Requirements

- A. *Initial inquiry*: When the agency has first contact concerning any child, including when a party reports child abuse or neglect or when the child is placed into the temporary custody of the agency under WIC 306 or WIC 307, the social worker must ask the child, parents, guardians, Indian custodians, relatives, and the party reporting child abuse or neglect whether the child may be an Indian child (a member of a tribe or eligible for membership and the child of a member of a tribe) and where the child, parents and Indian custodian are domiciled. (WIC §224.2 (a) & (b)) Do not assume a child may or may not be an Indian child based on appearance, family name, or generalizations. This inquiry must be done in every case. The precise questions that must be asked and the documentation of inquiry that must be in each case file are set out in CDSS guidance. Inquiry is required in all cases. The agency has an affirmative and continuing duty of ICWA inquiry throughout the life of a case.
- B. *Further inquiry*: If inquiry gives “reason to believe” that the child may be an Indian child, further inquiry is required. (WIC §224.2(e)) Further inquiry requires: (1) interviewing the parents, Indian custodian and extended family members to gather information required by WIC §224.3, including ancestry information back to the child’s great-grandparents, and other lineal ancestors identified as important to the child’s Indian status; (2) contacting the Bureau of Indian Affairs (BIA) and the California Department of Social Services (CDSS) for assistance identifying federally recognized tribes the child may be affiliated with based on the information gathered, and contact information for those tribes if the agency is not able to identify and contact the tribes without assistance; and (3) contacting the tribe(s) the child may be affiliated with by telephone, facsimile and/or email and sharing all available information identified by the tribe(s) as necessary to make a membership or eligibility determination.
- C. *When do I have “reason to believe”?* You have “reason to believe” when someone tells you they think the child or parents have Indian ancestry connected to a particular tribe, even if they do not know whether the parents or child are members or eligible for membership in a tribe.
- D. *Document inquiry thoroughly in the case file and on Juvenile Dependency Petition (form JV-100 or form JV-110) and Indian Child Inquiry Attachment (form ICWA-010(A))*:
1. Item 2 on JV-100, and JV-110 requires you to have conducted an initial ICWA inquiry and further inquiry if warranted.
 2. You are responsible for documenting your investigation on ICWA-010(A). If the child is an Indian child, you and the court will need to take specific steps to prevent the breakup of the child’s Indian family.
 3. Document in the ICWA-010(A) or in the court report, everyone you asked about Indian status and what their responses were. If you have “reason to believe” also document all efforts to interview extended family members, all contacts with the BIA & CDSS and all tribal contacts.
 4. You are responsible for ensuring that both parents and the Indian custodian or guardian, if any, complete and return *Parental Notification of Indian Status* (form ICWA-020). If the parents are not available, provide evidence to the court of all efforts you have made to have the parent(s) complete the ICWA-020 form.
- E. *When do I have “reason to know”?* Following initial inquiry and further inquiry you have “reason to know the child is an Indian child” if:
1. Anyone with an interest in the child provides you with information indicating that the child is an Indian child;

*All citations in this chart refer to the Indian Child Welfare Act (25 U.S.C. 1901 et seq. or “ICWA”), federal regulations implementing ICWA (25 C.F.R. Part 23), California Welf. & Inst. Code (“WIC”) and California Rules of Court, (“CRC”). Citations are to law current as of January 1, 2020.

2. If the child, the child's parents, or an Indian custodian reside or are domiciled on a reservation or in an Alaska Native Village;
3. The child is or ever has been under the jurisdiction of a tribal court; or
4. The child or either parent has an identification card or other document indicating membership in an Indian tribe. (WIC, § 224.2(d))

F. *What happens when I have "reason to know"?* If you have reason to know the child is an Indian child, you must:

1. Use due diligence to work with all tribes the child may be a member of or eligible for membership in to verify the child's Indian status. (WIC § 224.2 (g));
2. If there is reason to believe that the child is under the jurisdiction of a tribal court or resides or is domiciled on lands of a tribe that exercises exclusive jurisdiction over child custody proceedings you must contact the tribe by the next working day to make arrangements, as necessary, to transfer the child to the jurisdiction of the tribe. You must transfer custody of the child to the tribe within 24 hours of the tribe's confirmation the child is subject to exclusive tribal jurisdiction. (WIC §306(d) If you are unable to confirm tribal jurisdiction or are unable to transfer custody of the child to the tribe, you must proceed in state court and inform the court at the first hearing that the child may be subject to tribal jurisdiction. If confirmation is then received from the tribe, you must move to dismiss the petition.
3. Provide the tribe(s) with notice on the ICWA-030 form for all hearings that could result in foster care placement, termination of parental rights, preadoptive placement or adoptive placement of the child. (WIC §§224.2(f) & 224.3(b));
4. Provide active efforts to prevent removal, unless emergency removal is necessary to prevent imminent physical damage or harm to the child. (WIC §306(f)(4)); and
5. Comply with ICWA placement preferences if there is any removal, including an emergency removal, of the child from the custody of the parents or Indian custodian. (WIC §361.31(b)).

G. *Document active efforts:* If you know or have reason to know the child is an Indian child from initial contact, you must find resources and services that are culturally specific to the Indian child's family and directed at the issues the family is experiencing. You must actively pursue identification of the child's tribe and work with the child's tribe and extended family in developing these services. You must assist the parents in overcoming any barriers to accessing services. These resources and services are the *active efforts* that you must document to show that you are actively trying to prevent the breakup of the child's Indian family. Just as you would document *reasonable efforts* in non-ICWA cases, you must also document these active efforts thoroughly in the case file and in the court report before the child can be removed from his or her parent or Indian custodian and, in the event the family does not reunify, before parental rights can be terminated. You can find resources to help fulfill the active efforts requirement at <http://www.courts.ca.gov/5807.htm> . (ICWA § 1912(d); WIC §§224.1(f); 361.7; 727.4(d)(5)(D); CRC 5.485(c).)

II. ICWA Notice Requirements

- A. If you know or have reason to know the child is an Indian child, you must send a *Notice of Child Custody Proceeding for Indian Child* (form ICWA-030) to the child's parents or guardians, Indian custodian (if any), tribe(s) with which the child may be affiliated; and the Sacramento Office of the BIA; or the Secretary of the Interior for every hearing that may result in foster care placement, termination of parental rights, preadoptive placement or adoptive placement.
- B. *What to send:* Use mandatory form ICWA-030, *Notice of Child Custody Proceeding for Indian Child*, including attachments and a copy of the child's birth certificate where available, the petition and the report prepared for the hearing.
- C. *Where and whom to send formal ICWA notice:* ICWA notice must be sent to the child's parents, including adoptive parents, guardian, Indian custodian (if any), the child's tribe or potential tribe(s), and either the Sacramento Area Director of the BIA if you do not know the child's tribe or the Secretary of the Interior if you do know (see F below).
- D. *How to send notice:* Notice must be sent via registered/certified mail, return receipt requested. If a tribe intervenes in the case, you may thereafter send notice to it in the same manner as to other parties.

E. *Where to send tribal notice:* When sending notices to the child's tribe, they must be addressed to the tribal chairperson or other tribal representative designated for receipt of ICWA notice. The list of designated agents for service of ICWA notice may be found at: <https://www.bia.gov/bia/ois/dhs/icwa>. Send notice to the child's tribe, or to all tribes of which the child may be a member or eligible for membership until the court determines which tribe is the child's tribe, after which notice need be sent only to the tribe determined to be the Indian child's tribe. (WIC, §§ 224.2, 224.3; CRC 5.481(b).)

F. If you know the child's tribe (i.e., child is an enrolled member), notice does not need to go to other tribes, and you do not need to send notice to the regional BIA office.

G. *Purpose of notice:* The purpose of notice is to let the tribe know of the involuntary child custody proceeding potentially involving one of its children and to allow it to investigate to determine whether the child is a tribal member or eligible for membership and whether or not to participate in the proceedings. Therefore, it is important that the information you provide is complete and accurate. If it is not, your notice may be held to be inadequate. (ICWA § 1912(a); WIC, § 224.3; CRC 5.481(c).)

H. *How to prove notice:* File with the court copies of all notices, with the certified mail receipts, any return receipts, and all responses from a tribe or the BIA.

I. *Notices for hearings other than those listed in A.:* Once a child's tribe has been identified, the tribe is entitled to notices of all hearings not listed in A. above in the same manner and to the same extent as all other parties.

NOTE: For notices sent on the ICWA-030 by registered/certified mail, return receipt requested, it is not sufficient for you to state on the report that notice was sent. The green return receipt must be in the court file, with a copy in the social worker's file.

III. Emergency Removal/Detention Requirements for Indian Child (ICWA §§ 1912(d), 1915 (b), 1922; 25 C.F.R. §§23.2 & 23.113; WIC §§ 224.1; 319 (b), (d), (e) & (i); 361.31, 361.7, 636(c)(2); CRC 5.484(b) & (c).)

A. If it is known or there is reason to know the child is an Indian child, removal from parental custody without full compliance with the procedural and substantive requirements of ICWA is only authorized if there is proof that such removal is necessary to prevent imminent physical damage or harm to the child. (25 U.S.C. § 1922) A detention hearing under WIC 319 is deemed an "emergency proceeding" if it is known or there is reason to know the child is an Indian child. (WIC § 224.1(l))

B. The emergency removal or detention hearing may not be continued beyond 30 days unless the court makes specific findings under WIC §319(e)(2)(A)-(C). (25 C.F.R. §23.113; WIC §319(e)(2)) Any party may request an ex parte hearing prior to the dispositional hearing to seek return of the child. (WIC § 319.4) Emergency removals should generally not last longer than 30 days. The dispositional hearing must be completed within 30 days after the detention hearing unless the court finds that exceptional circumstances exist. The absence of a qualified expert witness does not, by itself, constitute exceptional circumstances. (WIC § 352 (b))

C. *Report Requirements:* Provide documentation to support your inquiry concerning possible Indian status and results of inquiry. If that inquiry gave you "reason to believe" or "reason to know" the child is or may be an Indian child you must submit evidence of your further inquiry and due diligence to determine the child's status in accordance with WIC 224.2 (e) & (g). Address all of the requirements of WIC 319(b)(1)-(9);

D. Provide documentation to support the required court findings regarding reasonable efforts and active efforts to prevent removal.

E. Provide documentation concerning consultation with the tribe concerning placement and how the placement fits within the ICWA placement preferences.

NOTE – the emergency removal/detention of an Indian child generally cannot last for more than 30 days. This means that you must prepare to get to disposition within 30 days of the detention hearing unless exceptional circumstances justify detention beyond that time. The child's tribe is a required member of the Child and Family Team (CFT). (Welf. & Inst. Code § 16501(a)(4)) Within the 30 day timeframe, you must convening a CFT to advise on development of the case plan, and identify a qualified expert witness.

IV. Jurisdiction Report/Hearing Requirements for Indian Child

- A. Provide documentation to support your ongoing efforts to determine the child's tribal membership or eligibility status and the results of those efforts.
- B. Provide documentation to support the required court findings regarding reasonable efforts and active efforts to prevent removal.
- C. Provide notice in accordance with section II above.

V. Disposition Report Requirements If an Indian Child Is Removed from Parental Custody

- A. Document any further inquiry efforts you have made to determine the child's Indian and tribal membership status by completing and attaching ICWA-010(A) to the disposition report.
- B. In collaboration with the child's tribe, prepare a case plan that includes resources and services that are remedial, rehabilitative, and culturally specific to the Indian child's family and are designed to prevent the breakup of the Indian family. (ICWA § 1912(d); WIC, § 361.7; CRC 5.484(c)). In preparing this case plan you must solicit and integrate the input of the child's identified Indian tribe. (CRC 5.690(c))
- C. Discuss with the child's identified Indian tribe whether tribal customary adoption as defined in section 366.24 is an appropriate permanent plan for the child if reunification is unsuccessful and include the contents of this discussion in your report. (WIC § 358.1; 361.5(g)(1)(G))
- D. Comply with ICWA notice requirements discussed in section II above.
- E. *Timing:* Generally, the "emergency removal" or detention of an Indian child cannot last more than 30 days from the detention hearing without getting to a hearing where the full substantive protections of ICWA are applied. (WIC §352 (b)) No hearing can be held until 10 days after receipt of notice by the tribe and others entitled to ICWA notice. The parents, Indian custodian (if any), and tribe are entitled to an additional 20 days to prepare for the hearing on request. (ICWA § 1912 (a); WIC, § 224.2(d); CRC 5.483(a).)
- F. If you know the child's tribe, you should consult with the tribe in developing the case plan and determining what services are appropriate for the parents and the child, and in finding an appropriate placement for the child.
- G. Obtain a qualified expert witness (QEW) meeting the requirements of section VI(B) below to testify at the hearing.
- H. In consultation with the child's tribe, make efforts to obtain a placement that complies with the ICWA placement preferences set out in section VI(D) and (E) below and document those efforts in your dispositional report.
- I. Document in the report your active efforts and reasonable efforts and make recommended legal findings for the court to adopt. (ICWA § 1912(d); WIC, § 361.7.)
- J. Ensure that you have all the evidence necessary to support the disposition that you are recommending. In particular ensure that any foster-care placement recommendation complies with the requirements for ICWA foster placement set out in section VI below.

VI. Foster Placement Requirements

- A. *ICWA preferences:* The foster-care placement of an Indian child must comply with the ICWA placement preferences and must meet the heightened ICWA evidentiary standards.
 - B. *Evidentiary standard:* Provide proof by clear and convincing evidence, including the testimony of at least one qualified expert witness (QEW) that, taking into account the prevailing social and cultural standards of the child's tribe, continued custody of the child by the parent, or Indian custodian is likely to result in serious emotional or physical damage to the child. (ICWA § 1912(e); WIC, §§ 361, 361.31, 361.7(c); CRC 5.485(a).)
 - C. *Who can serve as QEW?* A person knowledgeable in prevailing social and cultural standards of the Indian child's tribe, including that tribe's family organization and child-rearing practices. In descending order this includes a knowledgeable person who is designated by the child's tribe, a member of the child's tribe, an expert with substantial experience in delivery of child and family services to Indians (e.g., social worker, sociologist, physician, psychologist, traditional tribal therapist and healer, tribal spiritual leader, historian, or elder). (WIC § 224.6)
- NOTE: An employee of your social services department cannot serve as a QEW. (ICWA § 1912 (e); WIC, § 224.6; CRC 5.485(a).)

- D. *Placement preferences*: As with any child, the placement should be the least restrictive setting that most approximates a family and in which the child's special needs, if any, may be met. Unless the child's tribe has by resolution specified a different preference, preference must be given in order of priority to placement with (i) a member of the Indian child's extended family; (ii) a foster home licensed, approved, or specified by the Indian child's tribe; (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (iv) an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the Indian child's needs. If no placement is available that meets these preferences, efforts must be made to place the child with a family committed to preserving the child's family ties and tribal relations. (ICWA § 1915(b); WIC, § 361.31; CRC 5.485(b).)
- E. *Consultation with tribe*: When you know the child's tribe, you must consult with the tribe and make use of tribal services when formulating your placement recommendation. (WIC § 361.31(g))
- F. *Documentation of efforts regarding placement*: The court must make a finding that the placement accords with ICWA or that there is good cause to depart from the placement preferences. You must document in your report what efforts were made to find a placement that meets the preferences of ICWA. These efforts would include contacts with members of the child's extended family, contacts with the child's tribe seeking input and resources for placement, and contacts with other relevant Indian organizations (see I(E) for resources). These efforts should be made and documented each time there is a change in the Indian child's placement. (ICWA § 1916(b); WIC, § 361.31; CRC 5.482(f).)

VII Status Review, Permanency Planning, and Postpermanency Planning Hearing Requirements

- A. Document further inquiry efforts you have made to determine if an Indian child is involved by completing and attaching ICWA-010(A) to the report.
- B. Provide notice in accordance with section II above.
- C. Consult with tribe, specifically including a discussion of whether tribal customary adoption as defined in section 366.24 is an appropriate permanent plan for the child if reunification is unsuccessful and include the contents of this discussion in your report. (WIC § 358.1; 361.5(g)(1)(G)) .
- D. Prepare and file a report with recommended legal findings and orders supported by evidence of continued compliance with:
1. Reasonable and active efforts requirement discussed in I(E) above; and
 2. Efforts to find a placement that complies with ICWA preferences as discussed in VI(D) above.

VIII. Termination of Parental Rights Requirements (WIC, §§ 366.26, 727.31)

- A. You must provide evidence supported by the testimony of at least one QEW **beyond a reasonable doubt** that custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.
- B. You must consult with the tribe in formulating the permanent plan for the child, specifically including a discussion of whether tribal customary adoption as defined in section 366.24 is an appropriate permanent plan for the child if reunification is unsuccessful and include the contents of this discussion in your report. (WIC § 358.1; 361.5(g)(1)(G)) .
- C. Prepare and file a report with recommended legal findings and orders supported by evidence of continued compliance with:
1. Reasonable efforts and active efforts requirements discussed in I(E) above (ICWA § 1912(d); WIC, §§ 361.7, 366.26(c)(2)(B); CRC 5.485(a) & (c).);
 - and
 2. Compliance with adoptive preferences of ICWA if the recommended permanent plan for the child is adoption.
- Absent good cause to the contrary, for any adoptive placement of an Indian child, preference of placement shall be given in priority order to (i) a member of the child's extended family, (ii) other members of the Indian child's tribe, or (iii) other Indian families. (ICWA § 1915(a); WIC, § 727.3.)
- D. *Good cause not to terminate parental rights*: State law now recognizes that at the option of the tribe, tribal customary adoption is an appropriate

permanent plan. California law also recognizes other exceptions to termination of parental rights (TPR) for tribal children. Many tribal cultures do not believe in TPR. Accordingly, it is good cause not to terminate if TPR would interfere with connection to tribal community or membership or the child's tribe has identified guardianship, long-term foster care, or another permanent plan as the preferred plan for the child. (WIC, § 366.26(c)(2)(B)); CRC 5.485(b).)