

# **Understanding ICWA's Requirements and the Involvement of State and Tribal Judges**



*Catherine Begaye  
Hearing Officer  
Second Judicial District Court*





**25 U.S.C. §§ 1901-63**

**§ 1901. Congressional findings**

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds--

- (1) that clause 3, section 8, article I of the United States Constitution provides that ``The Congress shall have Power \* \* \* To regulate Commerce \* \* \* with Indian tribes<sup>1</sup> and, through this and other constitutional authority, Congress has plenary power over Indian affairs;
- (2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;
- (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;
- (4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and
- (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families. (Pub. L. 95-608, § 2, Nov. 8, 1978, 92 Stat. 3069.) Short Title Section 1 of Pub. L. 95-608 provided: ``That this Act [enacting this chapter] may be cited as the `Indian Child Welfare Act of 1978'."

**§ 1902. Congressional declaration of policy**

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs. (Pub. L. 95-608, § 3, Nov. 8, 1978, 92 Stat. 3069.)

**§ 1903. Definitions**

For the purposes of this chapter, except as may be specifically provided otherwise, the term--

- (1) "child custody proceeding" shall mean and include--
  - (i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;
  - (ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;
  - (iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and
  - (iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.  
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.
- (2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;
- (3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in 1606 of title 43;
- (4) "Indian child" means 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;
- (5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in

more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

- (6) "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;
- (7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;
- (8) "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 because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of title 43;
- (9) "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;
- (10) "reservation" means Indian country as defined in section 1151 of title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;
- (11) "Secretary" means the Secretary of the Interior; and
- (12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings. (Pub. L. 95-608, § 4, Nov. 8, 1978, 92 Stat. 3069.) Section Referred to in Other Sections This section is referred to in sections 1727, 3202, 3653, 4302 of this title; title 12 section 4702; title 26 section 168.

### **Subchapter 1** **Child Custody Proceedings**

#### **§ 1911. Indian tribe jurisdiction over Indian child custody proceedings**

##### **(a) Exclusive jurisdiction**

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the

Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

##### **(b) Transfer of proceedings; declination by tribal court**

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.

##### **(c) State court proceedings; intervention**

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

##### **(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes**

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity. (Pub. L. 95-608, title I, § 101, Nov. 8, 1978, 92 Stat. 3071.) Section Referred to in Other Sections This section is referred to in sections 1914, 1918, 1923 of this title.

#### **§ 1912. Pending court proceedings**

##### **(a) Notice; time for commencement of proceedings; additional time for preparation**

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: Provided, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

**(b) Appointment of counsel**

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

**(c) Examination of reports or other documents**

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

**(d) Remedial services and rehabilitative programs; preventive measures**

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

**(e) Foster care placement orders; evidence; determination of damage to child**

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.

**(f) Parental rights termination orders; evidence; determination of damage to child**

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, 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. (Pub. L. 95-608, title I, § 102, Nov. 8, 1978, 92 Stat. 3071.) Section Referred to in Other Sections This section is referred to in sections 1914, 1916 of this title.

**§ 1913. Parental rights; voluntary termination**

**(a) Consent; record; certification matters; invalid consents**

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court

of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

**(b) Foster care placement; withdrawal of consent**

Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

**(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody**

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

**(d) Collateral attack; vacation of decree and return of custody; limitations**

After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law. (Pub. L. 95-608, title I, § 103, Nov. 8, 1978, 92 Stat. 3072.) Section Referred to in Other Sections This section is referred to in section 1914 of this title.

**§ 1914. Petition to court of competent jurisdiction to invalidate action upon showing of certain violations**

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title. (Pub. L. 95-608, title I, § 104, Nov. 8, 1978, 92 Stat. 3072.)

## **§ 1915. Placement of Indian children**

### **(a) Adoptive placements; preferences**

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

### **(b) Foster care or preadoptive placements; criteria; preferences**

Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a 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 which has a program suitable to meet the Indian child's needs.

### **(c) Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences**

In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: Provided, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

### **(d) Social and cultural standards applicable**

The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

### **(e) Record of placement; availability**

A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the

request of the Secretary or the Indian child's tribe. (Pub. L. 95-608, title I, § 105, Nov. 8, 1978, 92 Stat. 3073.)

## **§ 1916. Return of custody**

### **(a) Petition; best interests of child**

Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 1912 of this title, that such return of custody is not in the best interests of the child.

### **(b) Removal from foster care home; placement procedure**

Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this chapter, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed. (Pub. L. 95-608, title I, § 106, Nov. 8, 1978, 92 Stat. 3073.)

## **§ 1917. Tribal affiliation information and other information for protection of rights from tribal relationship; application of subject of adoptive placement; disclosure by court**

Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship. (Pub. L. 95-608, title I, § 107, Nov. 8, 1978, 92 Stat. 3073.)

## **§ 1918. Reassumption of jurisdiction over child custody proceedings**

### **(a) Petition; suitable plan; approval by Secretary**

Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

**(b)Criteria applicable to consideration by Secretary; partial retrocession**

- (1) In considering the petition and feasibility of the plan of a tribe under subsection (a) of this section, the Secretary may consider, among other things:
  - i. whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;
  - ii. the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;
  - iii. the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and (iv) the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area.
- (2) In those cases where the Secretary determines that the jurisdictional provisions of section 1911(a) of this title are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this title, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 1911(a) of this title over limited community or geographic areas without regard for the reservation status of the area affected.

**(c)Approval of petition; publication in Federal Register; notice; reassumption period; correction of causes for disapproval**

If the Secretary approves any petition under subsection (a) of this section, the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a) of this section, the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

**(d)Pending actions or proceedings unaffected**

Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 1919 of this title. (Pub. L. 95-608, title I, § 108, Nov. 8, 1978, 92 Stat. 3074.)

**§ 1919. Agreements between States and Indian tribes**

**(a)Subject coverage**

States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.

**(b)Revocation; notice; actions or proceedings unaffected**

Such agreements may be revoked by either party upon one hundred and eighty days' written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise. (Pub. L. 95-608, title I, § 109, Nov. 8, 1978, 92 Stat. 3074.)

**Section Referred to in Other Sections**

This section is referred to in sections 1918, 1923 of this title.

**§ 1920. Improper removal of child from custody; declination of jurisdiction; forthwith return of child: danger exception**

Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

**§ 1921. Higher State or Federal standard applicable to protect rights of parent or Indian custodian of Indian child**

In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.

**§ 1922. Emergency removal or placement of child; termination; appropriate action**

Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage

or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

### **§ 1923. Effective date**

None of the provisions of this subchapter, except sections 1911(a), 1918, and 1919 of this title, shall affect a proceeding under State law for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement which was initiated or completed prior to one hundred and eighty days after November 8, 1978, but shall apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

## **Subchapter II** **Indian Child and Family Programs**

### **§ 1931. Grants for on or near reservation programs and child welfare codes**

#### **(a) Statement of purpose; scope of programs**

The Secretary is authorized to make grants to Indian tribes and organizations in the establishment and operation of Indian child and family service programs on or near reservations and in the preparation and implementation of child welfare codes. The objective of every Indian child and family service program shall be to prevent the breakup of Indian families and, in particular, to insure that the permanent removal of an Indian child from the custody of his parent or Indian custodian shall be a last resort. Such child and family service programs may include, but are not limited to--

- (1) a system for licensing or otherwise regulating Indian foster and adoptive homes;
- (2) the operation and maintenance of facilities for the counseling and treatment of Indian families and for the temporary custody of Indian children;
- (3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care;
- (4) home improvement programs;
- (5) the employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters;
- (6) education and training of Indians, including tribal court judges and staff, in skills relating to child and family assistance and service programs;
- (7) a subsidy program under which Indian adoptive children may be provided support comparable to

that for which they would be eligible as foster children, taking into account the appropriate State standards of support for maintenance and medical needs; and

- (8) guidance, legal representation, and advice to Indian families involved in tribal, State, or Federal child custody proceedings.

#### **(b) Non-Federal matching funds for related Social Security or other Federal financial assistance programs; assistance for such programs unaffected; State licensing or approval for qualification for assistance under federally assisted program**

Funds appropriated for use by the Secretary in accordance with this section may be utilized as non-Federal matching share in connection with funds provided under titles IV-B and XX of the Social Security Act [42 U.S.C. 620 et seq., 1397 et seq.] or under any other Federal financial assistance programs which contribute to the purpose for which such funds are authorized to be appropriated for use under this chapter. The provision or possibility of assistance under this chapter shall not be a basis for the denial or reduction of any assistance otherwise authorized under titles IV-B and XX of the Social Security Act or any other federally assisted program. For purposes of qualifying for assistance under a federally assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a State.

### **§ 1932. Grants for off-reservation programs for additional services**

The Secretary is also authorized to make grants to Indian organizations to establish and operate off-reservation Indian child and family service programs which may include, but are not limited to--

- (1) a system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as Indian foster children, taking into account the appropriate State standards of support for maintenance and medical needs;
- (2) the operation and maintenance of facilities and services for counseling and treatment of Indian families and Indian foster and adoptive children;
- (3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care; and
- (4) guidance, legal representation, and advice to Indian families involved in child custody proceedings. (Pub. L. 95-608, title II, § 202, Nov. 8, 1978, 92 Stat. 3076.)

Section Referred to in Other Sections

This section is referred to in section 1934 of this title.



**§ 1933. Funds for on and off reservation programs**

shall not be subject to the Freedom of Information Act (5 U.S.C. 552), as amended.

**(a)Appropriated funds for similar programs of Department of Health and Human Services; appropriation in advance for payments**

In the establishment, operation, and funding of Indian child and family service programs, both on and off reservation, the Secretary may enter into agreements with the Secretary of Health and Human Services, and the latter Secretary is hereby authorized for such purposes to use funds appropriated for similar programs of the Department of Health and Human Services: Provided, That authority to make payments pursuant to such agreements shall be effective only to the extent and in such amounts as may be provided in advance by appropriation Acts.

**(b)Appropriation authorization under section 13 of this title**

Funds for the purposes of this chapter may be appropriated pursuant to the provisions of section 13 of this title. (Pub. L. 95-608, title II, § 203, Nov. 8, 1978, 92 Stat. 3076; Pub. L. 96-88, title V, § 509(b), Oct. 17, 1979, 93 Stat. 695.)

**§ 1934. "Indian" defined for certain purposes**

For the purposes of sections 1932 and 1933 of this title, the term "Indian" shall include persons defined in section 1603(c) of this title.

**Subchapter III**

**Recordkeeping, Information Availability, and Timetables**

**§ 1951. Information availability to and disclosure by Secretary**

**(a)Copy of final decree or order; other information; anonymity affidavit; exemption from Freedom of Information Act**

Any State court entering a final decree or order in any Indian child adoptive placement after November 8, 1978, shall provide the Secretary with a copy of such decree or order together with such other information as may be necessary to show--

- (1) the name and tribal affiliation of the child;
- (2) the names and addresses of the biological parents;
- (3) the names and addresses of the adoptive parents; and
- (4) the identity of any agency having files or information relating to such adoptive placement.

Where the court records contain an affidavit of the biological parent or parents that their identity remain confidential, the court shall include such affidavit with the other information. The Secretary shall insure that the confidentiality of such information is maintained and such information

**(b)Disclosure of information for enrollment of Indian child in tribe or for determination of member rights or benefits; certification of entitlement to enrollment**

Upon the request of the adopted Indian child over the age of eighteen, the adoptive or foster parents of an Indian child, or an Indian tribe, the Secretary shall disclose such information as may be necessary for the enrollment of an Indian child in the tribe in which the child may be eligible for enrollment or for determining any rights or benefits associated with that membership. Where the documents relating to such child contain an affidavit from the biological parent or parents requesting anonymity, the Secretary shall certify to the Indian child's tribe, where the information warrants, that the child's parentage and other circumstances of birth entitle the child to enrollment under the criteria established by such tribe.

**§ 1952. Rules and regulations**

Within one hundred and eighty days after November 8, 1978, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter.

**Subchapter IV**  
**Miscellaneous Provisions**

**§ 1962. Locally convenient day schools**

**(a)Sense of Congress**

It is the sense of Congress that the absence of locally convenient day schools may contribute to the breakup of Indian families.

**(b)Report to Congress; contents, etc.**

The Secretary is authorized and directed to prepare, in consultation with appropriate agencies in the Department of Health and Human Services, a report on the feasibility of providing Indian children with schools located near their homes, and to submit such report to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives within two years from November 8, 1978. In developing this report the Secretary shall give particular consideration to the provision of educational facilities for children in the elementary grades. (Pub. L. 95-608, title IV, § 401, Nov. 8, 1978, 92 Stat. 3078; Pub. L. 96-88, title V, § 509(b), Oct. 17, 1979, 93 Stat. 695.)

**§ 1962. Copies to the States**

Within sixty days after November 8, 1978, the Secretary shall send to the Governor, chief justice of the highest court of appeal, and the attorney general of each State a copy of this chapter, together with committee reports and an explanation of the provisions of this chapter.

**§ 1963. Severability**

If any provision of this chapter or the applicability thereof is held invalid, the remaining provisions of this chapter shall not be affected thereby.

STATE OF NEW MEXICO  
COUNTY OF BERNALILLO  
SECOND JUDICIAL DISTRICT  
IN THE CHILDREN’S COURT

Case No.: D-202-JQ \_\_\_\_\_

STATE OF NEW MEXICO ex rel.  
CHILDREN, YOUTH AND FAMILIES DEPARTMENT,  
IN THE MATTER OF

\_\_\_\_\_, CHILD(REN),

AND CONCERNING

\_\_\_\_\_, RESPONDENT(S).

**REPORT/ORDER REGARDING INDIAN CHILD WELFARE ACT**  
**[Compliance]**

THIS MATTER came before the Court [*sua sponte*][custody hearing][after a status hearing addressing ICWA] / [upon motion by a party and a resulting hearing], on the \_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_, and the Court FINDS the following facts:

- Child[ren] \_\_\_\_\_ [is an/are] “Indian child[ren];” therefore, the Indian Child Welfare Act applies;
- There is reason to know that the Child[ren] \_\_\_\_\_ [is an/are] “Indian child[ren]” under 25 C.F.R. § 23.107(c); until a final determination can be made, the child will be treated as an Indian child;
- At the hearing on \_\_\_\_\_ [date] information provided indicated the child[ren] may be member(s) or eligible for membership with \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_ [tribe name(s)].

1. **Due Diligence to Identify Tribes.** The Department must use due diligence to identify and work with all of the Tribes of which there is reason to know the child[ren] may be a member (or eligible for membership) and/or to verify whether the child[ren] is/are in fact a

**member(s)** (or a biological parent is a **member** and the child is **eligible for membership**). See 25 C.F.R. § 23.107; and

- The Department DID NOT use due diligence to identify and work with the \_\_\_\_\_ [name of tribe].
- The Department DID use due diligence to identify and work with all of the Tribes the Department identified and/or has been in communication with \_\_\_\_\_ [name of tribe].

2. **Children’s Code Reasonable Efforts to Identify Tribes.** Under Children’s Code § 32A-4-6(C), the Department must make reasonable efforts to identify whether the child[ren] [is an/are] Indian Child(ren).

- the Department DID NOT make reasonable efforts to identify whether the child[ren] [is an/are] Indian Child[ren].
- the Department DID make reasonable efforts to identify whether the Child[ren] [is an/are] Indian Child[ren].

3. The Court recognizes 25 U.S.C. § 1921 when applying the laws to this case, specifically:

In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.

**WHEREFORE THE COURT ORDERS:**

1. The Department *shall file* with the Court a completed Children’s Court Rule 10-521 “ICWA Notice as to Child[ren]” within two (2) business days of the date of the filing of this Order;

2. The Department *shall send* the Rule 10-521 ICWA Notice to the appropriate Tribes and/or BIA Regional Office. The Rule 10-521 ICWA Notice must be sent to the designated tribal agent listed in the Federal Register at:

<https://www.federalregister.gov/documents/2018/06/04/2018-11924/indian-child-welfare-act-designated-tribal-agents-for-service-of-notice>.

3. The Department *shall file* with the Court proof that the Rule 10-521 Notice has been sent to each of the Tribes or BIA Regional Office in accordance with the ICWA requirements under 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111(a), (b) and/or (e); and the statutory requirements of § 32A-1-14(B) and § 32A-4-6(D) and (E).

4. The Department *shall file* with the Court proof of the *date* that the Rule 10-521 ICWA Notice was *received* by the Tribes and or BIA Regional Office. This proof is necessary for the Court to be able to assess whether the “waiting period” has been met under 25 U.S.C. § 1912(a) (“No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary....”).

5. Any and all responses from the Tribes and/or BIA Regional Office to the Department as a result of the Rule 10-521 ICWA Notice *shall be filed* with the Court within five (5) business days of receipt by the Department;

6. If the response(s) from the Tribes and/or BIA Regional Office to the Rule 10-521 ICWA Notice call for a different finding than one entered in the case, the Department shall request a hearing titled “Hearing to Change ICWA Finding,” and the Court will set the hearing promptly.

7. Compliance with this Order Regarding Indian Child Welfare Act *shall be* addressed at the next hearing, and the Department shall be prepared to present any further update.

8. All counsel for all parties are required to appear to present and preserve legal argument regarding ICWA compliance at any Hearing to “Change ICWA Finding”, regardless of whether service has been made on the Respondent(s).

9. These procedures shall be implemented every time the Department receives information in this case that a child may be an Indian child.

Date:

Recommended by:

\_\_\_\_\_

\_\_\_\_\_

SPECIAL MASTER

IT IS SO ORDERED.

Date:

\_\_\_\_\_

\_\_\_\_\_

DISTRICT COURT JUDGE  
CHILDREN’S COURT DIVISION

**Certificate of Service**

I certify that a copy of this Report/Order has been provided to all counsels for this case on \_\_\_\_\_, by placing a copy in their folder in the Children’s Court Clerk’s Office.

\_\_\_\_\_  
TCAA

**Notice Regarding Special Master Reports:** Pursuant to Rule 10-163(E), you have five (5) days from the date of a Special Master’s Report to file written objections with the Court. Those written objections must conform with all requirements in Rule 10-163(E). If no objections are filed by the due date, the Special Master’s Report is adopted as an Order of the Court.

**Parties Entitled to Copies:** *The Department shall ensure that the Indian Tribe(s) and/or BIA Regional Office receive a copy of this Order within five (5) business days.\* The Department shall file a certificate of service reflecting the same.*

Children’s Court Attorney\*: \_\_\_\_\_

Guardian *ad Litem* / Youth Attorney: \_\_\_\_\_

Guardian *ad Litem* / Youth Attorney: \_\_\_\_\_

Respondent Attorney: \_\_\_\_\_

Respondent Attorney: \_\_\_\_\_

Respondent Attorney: \_\_\_\_\_

Respondent Attorney: \_\_\_\_\_

STATE OF NEW MEXICO  
COUNTY OF BERNALILLO  
SECOND JUDICIAL DISTRICT  
IN THE CHILDREN’S COURT

Case No.: D-202-JQ \_\_\_\_\_

STATE OF NEW MEXICO ex rel.  
CHILDREN, YOUTH AND FAMILIES DEPARTMENT,  
IN THE MATTER OF

\_\_\_\_\_,  
Child(ren), and CONCERNING  
\_\_\_\_\_,  
Respondent(s).

**EX PARTE ORDER REGARDING INDIAN CHILD WELFARE ACT**

THIS MATTER came before the Court *sua sponte* and upon review of the Neglect/Abuse Petition and Affidavit for *Ex Parte* Custody Order on the \_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_, and the Court FINDS:

1. The face of the pleadings filed herein reflect there is reason to know that the child[ren] may be [an] “Indian child[ren]” under 25 C.F.R. §23.107(c).
2. **Due Diligence to Identify Tribes.** The Department must use due diligence to identify and work with all of the Tribes of which there is reason to know the child[ren] may be a member (or eligible for membership) and/or to verify whether the child[ren] is/are in fact a **member(s)** (or a biological parent is a **member** and the child is **eligible for membership**). See 25 C.F.R. § 23.107; and
3. **Children’s Code Reasonable Efforts to Identify Tribes.** Under Children’s Code § 32A-4-6(C), the Department must make reasonable efforts to identify whether the child[ren] is/are [an] “Indian Child.”
4. The Court recognizes 25 U.S.C. § 1921 when applying the laws to this case, specifically:

In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.

**WHEREFORE THE COURT ORDERS:**

1. The Department *shall file* with the Court a completed Children’s Court Rule 10-521 “ICWA Notice as to Child[ren]” within two (2) business days of the date of the filing of this Order;
2. The Department *shall send* the Rule 10-521 ICWA Notice to the appropriate tribes and/or BIA Regional Office. The Rule 10-521 ICWA Notice must be sent to the designated tribal agent listed in the Federal Register at:  
  
<https://www.federalregister.gov/documents/2018/06/04/2018-11924/indian-child-welfare-act-designated-tribal-agents-for-service-of-notice>
3. The Department *shall file* with the Court proof that the Rule 10-521 Notice has been sent to each of the tribes or BIA Regional Office in accordance with the ICWA requirements under 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111(a), (b) and/or (e); and the statutory requirements of § 32A-1-14(B) and § 32A-4-6(D) and (E).
4. The Department *shall file* with the Court proof of the *date* that the Rule 10-521 ICWA Notice was *received* by the tribes and or BIA Regional Office. This proof is necessary for the Court to be able to assess whether the “waiting period” has been met under 25 U.S.C. § 1912(a) (“No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary....”).



5. Any and all responses from the tribes and/or BIA Regional Office to the Department as a result of the Rule 10-521 ICWA Notice *shall be filed* with the Court within five (5) business days of receipt by the Department;
6. If the response(s) from the tribes and/or BIA Regional Office to the Rule 10-521 ICWA Notice call for a different finding than one entered in the case, the Department shall request a hearing titled “Hearing to Change ICWA Finding,” and the Court will set the hearing promptly;
7. Compliance with this *Ex Parte* Order Regarding Indian Child Welfare Act *shall be* addressed at the Custody Hearing as well, and the Department shall be prepared to present any further update;
8. All counsel for all parties are required to appear to present and preserve legal argument regarding ICWA compliance at the Custody hearing or any separate hearing to change an ICWA finding, regardless of whether service has been made on the Respondent(s);
9. These procedures shall be implemented every time the Department receives information in this case that a child may be an Indian child.

IT IS SO ORDERED.

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[Judge]  
DISTRICT COURT JUDGE  
CHILDREN’S COURT DIVISION

Recommended by:

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[SM]  
SPECIAL MASTER

### **Certificate of Service**

I certify that a copy of this *Ex Parte* Order Regarding Indian Child Welfare Act has been provided to the Department by hand-delivery on the date of filing.

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TCAA

**Parties Entitled to Copies** – within two (2) business days of the filing of this Ex Parte Order Regarding Indian Child Welfare Act, the *Department shall* ensure a copy of this order is served on the designated tribal agent for each Indian Tribe(s) and/or BIA Regional Office, **any subsequently appointed counsel for the child, and Respondents, not yet identified at the time of filing the Petition.** The Department shall file Certificate of Service that reflects the same.