

2016 Indian Child Welfare Act Regulations



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Brief Timeline Leading to Regulations



- 1978 – Congress enacts ICWA.
- 1979 – Bureau of Indian Affairs publishes non-binding Guidelines for State Courts and Agencies as well as binding Regulations on Notice to Tribes
- 1989 – SCOTUS interprets ICWA for the first time – *Holyfield* – finds Congressional intent favors uniform application of the law.
- 1982 – 2013 – several states enact their own ICWA laws to improve implementation.
- 2013 – SCOTUS decides *Adoptive Couple v. Baby Girl*.

2015 Guidelines



- First major update since 1979 Guidelines were published.
- Incorporated years of state and federal case law as well as state ICWA laws.
- 2015 Guidelines remain non-binding.
- They also have an expiration date. With the publication of the final ICWA regulations, the BIA announced it would republish updated Guidelines before December 2016.

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- **Authority to Enact Regulations**
 - In ICWA itself, Congress provided the BIA the authority to promulgate regulations:
 - ✦ 25 U.S.C. § 1952 – the Secretary of the Interior “shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter.”
 - BIA has issued binding ICWA regulations twice before:
 - ✦ First in 1979 and again in 1994

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- Why Regulations now?
 - In 30+ years since ICWA enacted:
 - ✦ Indian children are **still** removed from their homes and communities at a disproportionately higher rate than other children.
 - ✦ 56% placed in non-relative, non-Native homes.
 - Implementation of ICWA by States has been inconsistent:
 - ✦ Different interpretations from State to State.
 - ✦ Different interpretations even from court to court within States.

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- **Sec. 23.101 – Purpose**
 - The regulations in this subpart clarify the minimum Federal standards governing implementation of the Indian Child Welfare Act (ICWA) to ensure that ICWA is applied in all States consistent with the Act’s express language, Congress’s intent in enacting the statute, and to promote the stability and security of Indian tribes and families.

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- **Overview:**

- Adds a new subpart (Subpart I) to 25 C.F.R Part 23:
 - ✦ Identifying Whether ICWA Applies
 - ✦ Verifying Whether Child is an “Indian child” and identifying Child’s Tribe
 - ✦ Notice of Proceedings
 - ✦ Procedures for Transfer to Tribal Court
 - ✦ Adjudication of Involuntary Placements, Adoptions, or TPRs
 - ✦ Placement Preferences
 - ✦ Voluntary Proceedings
 - ✦ Post-Trial Rights and Recordkeeping

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- **Sec. 23.103 – Application – “The What”**
 - The Regulations clarify that ICWA applies to:
 - ✦ “A child-custody proceeding” - Any action (that is a non-emergency proceeding) that may culminate in one of the following outcomes:
 - Foster-care placement
 - TPR
 - Preadoptive placement (after TPR)
 - Adoptive placement
 - ✦ An “emergency proceeding” - Any court action that involves an emergency removal or emergency placement of an “Indian child.”

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- **Sec. 23.103(c) – Existing Indian Family Exception**
 - If a proceeding listed in paragraph (a) of this section concerns a child who meets the statutory definition of “Indian child,” then ICWA **will** apply to that proceeding.
 - In determining whether ICWA applies to a proceeding, the State court **may not** consider factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child’s blood quantum.

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- **Sec. 23.107 – The “Who”**
 - (a) State **courts** must ask each participant in an emergency or voluntary or involuntary child-custody proceeding whether the participant knows or has reason to know that the child is an Indian child. The inquiry is made at the commencement of the proceeding and all responses should be on the record. State **courts** must instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child.

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- **Sec. 23.107 – The “Who”**
 - In seeking verification of the child’s status **in a voluntary proceeding** where a consenting parent evidences, by written request or statement in the record, a desire for anonymity, the court must keep relevant documents pertaining to the inquiry required under this section confidential and under seal.
 - A request for anonymity does not relieve the court, agency, or other party from any duty of compliance with ICWA, including the obligation to verify whether the child is an “Indian child.”
 - A Tribe receiving information related to this inquiry must keep documents and information confidential.

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- **Sec. 23.110 – The “Where”**
 - (a) The court in any voluntary or involuntary child-custody proceeding involving an Indian child must determine the residence and **domicile** of the Indian child. If either the residence or domicile is on a reservation where the Tribe exercises exclusive jurisdiction over child-custody proceedings, the State court must expeditiously notify the Tribal court of the pending dismissal based on the Tribe’s exclusive jurisdiction, dismiss the State-court child-custody proceeding, and ensure that the Tribal court is sent all information regarding the Indian child-custody proceeding, including, but not limited to, the pleadings and any court record.

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- **Sec. 23.2 – Definitions**

- **Domicile means:**

- ✦ (1) For a parent or Indian custodian, the place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain indefinitely even though the person may be currently residing elsewhere.
- ✦ (2) For an Indian child, the domicile of the Indian child's parents or Indian custodian or guardian. In the case of an Indian child whose parents are not married to each other, the domicile of the Indian child's custodial parent.

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- Sec. 23.111 – Notice
 - When a court knows or has reason to know the child is an “Indian child” in an involuntary foster-care-placement or TPR proceeding, the court must ensure that:
 - ✦ The party seeking placement promptly sends notice of **each such child-custody proceeding** by registered or certified mail, return receipt requested, to:
 - Each Tribe where the child may be a member (or eligible for membership if a biological parent is a member)
 - The child’s parents; and
 - If applicable, the child’s Indian custodian; and
 - ✦ An original or a copy of each notice is filed with the court, together with any return receipts or other proof of service

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- **Sec. 23.111 – Notice**
 - In addition to Tribal Notice, the Regulations continue to require notice be served on the applicable BIA Regional Director.
 - Sec. 23.11 – Lists the addresses of record for each BIA regional office as well as what Indian tribes they service.

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- **Sec. 23.111 – Notice**

- Contents of Notice – Overview

- ✦ Must be in clear and understandable language; and
- ✦ Must include (among other things):
 - The child's name, birthdate, and birthplace;
 - Parents' information - all names known
 - Other direct lineal ancestors' (e.g., grandparents') information, if known;
 - The name of each Indian Tribe in which the child is a member (or may be eligible for membership);
 - Copies of all court documents;
 - Statements notifying recipient of their rights in the proceedings, including. . .

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- **Sec. 23.111 – Notice**

- **Rights of Recipients**

- ✦ The right of the parent or Indian custodian to intervene in the proceedings;
- ✦ The right of the tribe to intervene in the proceedings;
- ✦ That the parent or Indian custodian has the right to court-appointed counsel if he/ she is indigent;
- ✦ The right to be granted, upon request, up to 20 additional days to prepare for the child-custody proceedings;
- ✦ The right of the parent, Indian custodian, and the Tribe to petition the court for transfer to Tribal court.

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- **Notice of Voluntary Proceedings**
 - Notice is not specifically required in voluntary proceedings.
 - But, Sec. 23.124 still applies to voluntary proceedings:
 - ✦ Participants must state on the record whether child is an Indian Child.
 - ✦ Court must ensure the party seeking placement has taken all reasonable steps to verify the child's status which may include contacting the Tribe.
 - Thus, notice in a voluntary proceeding may be necessary to ensure compliance with Sec. 23.124.
 - BIA recommends Notice in all cases; State ICWAs often require it.
 - Request for anonymity does not change requirements.

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- **Sec. 23.113 – Emergency Removals**
 - Special Rules apply to Emergency Removals
 - State may only remove or place a child on an emergency basis to prevent imminent physical damage or harm
 - ✦ Must promptly hold a hearing and terminate proceeding immediately once the danger is no longer present
 - ✦ Applies to both children domiciled on reservation who are temporarily off reservation and children domiciled off reservation
 - ✦ Normally should not continue for more than 30 days

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- **Sec. 23.117 – Transfer to Tribal Court**
 - Upon receipt of a transfer petition from an Indian child’s parent, Indian custodian, or Tribe, the State court must transfer the child-custody proceeding unless the court determines that transfer is not appropriate because one or more of the following criteria are met:
 - ✦ (a) Either parent objects to such transfer;
 - ✦ (b) The Tribal court declines the transfer; or
 - ✦ (c) Good cause exists for denying the transfer.

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- **Sec. 23.117 – Transfer to Tribal Court**
 - “Good Cause” - (c) In determining whether good cause exists, the court must not consider:
 - ✦ (1) Whether the foster-care or termination-of-parental-rights proceeding is at an advanced stage if the Indian child’s parent Indian custodian, or Tribe did not receive notice of the child-custody proceeding until an advanced stage;
 - ✦ (2) Whether there have been prior proceedings involving the child for which no petition to transfer was filed;
 - ✦ (3) Whether transfer could affect the placement of the child;
 - ✦ (4) The Indian child’s cultural connections with the Tribe or its reservation; or
 - ✦ (5) Socioeconomic conditions or any negative perception of Tribal or BIA social services or judicial systems.

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- Adjudications

- Sec. 23.120 – Active Efforts

- ✦ (a) Prior to ordering an involuntary foster-care placement or termination of parental rights, **the court must** conclude that active efforts have been made to prevent the breakup of the Indian family and that those efforts have been unsuccessful.

- So what are are “active efforts?”

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- **Sec. 23.2 – “Active Efforts” “Defined”**
 - “Active efforts means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family.”
 - Sec. 23.2 provides 11 examples.
 - Should be conducted in partnership with tribe, child, parents, extended family, consistent with tribe’s social/cultural standards.
 - All active efforts must be documented.

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- **Placement Preferences**

- Sec. 23.129(c) – The placement preferences must be applied in *any* foster-care, preadoptive, or adoptive placement unless there is a determination on the record that good cause under § 23.132 exists to not apply those placement preferences.
- Sec. 23.132(b) – The party seeking departure from the placement preferences should bear the burden of proving by clear and convincing evidence that there is “good cause” to depart from the placement preferences.

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- What constitutes good cause?
 - Should be based on one or more of the following considerations:
 - ✦ (1) The request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference;
 - ✦ (2) The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made;
 - ✦ (3) The presence of a sibling attachment that can be maintained only through a particular placement;
 - ✦ (4) The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the where families who meet the placement preferences live;
 - ✦ (5) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located. For purposes of this analysis, the standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.

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- What cannot be considered “good cause”
 - (d) A placement may not depart from the preferences based on the socioeconomic status of any placement relative to another placement.
 - (e) A placement may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.

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- **Levels of Legal Authority**
 - Federal Law (ICWA)
 - Regulations (23 C.F.R. Part 23)
 - State Laws
 - State Case Law
 - Federal Case Law
 - Court Rules
 - Federal Guidelines
 - Department Policies

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- Sec. 23.106 – How do the Regulations interact with existing state and federal law?
 - (a) The regulations in this subpart provide minimum Federal standards to ensure compliance with ICWA.
 - (b) Under section 1921 of ICWA, where applicable State or other Federal law provides a higher standard of protection to the rights of the parent or Indian custodian than the protection accorded under the Act, ICWA requires the State or Federal court to apply.

Thank You



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